UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/AC.109/1163
8 July 1993

ORIGINAL: ENGLISH

SPECIAL COMMITTEE ON THE SITUATION
WITH REGARD TO THE IMPLEMENTATION
OF THE DECLARATION ON THE GRANTING
OF INDEPENDENCE TO COLONIAL
COUNTRIES AND PEOPLES

WESTERN SAHARA

Working paper prepared by the Secretariat

CONTENTS

		Paragraphs	Page
I.	GENERAL	1	2
II.	CONSIDERATION BY THE GENERAL ASSEMBLY AT ITS FORTY-SEVENTH SESSION	2 - 3	2
III.	GOOD OFFICES OF THE SECRETARY-GENERAL	4 - 23	4
IV.	POLITICAL AND OTHER DEVELOPMENTS	24 - 40	8

110793

93-39042 (E) 090793

/...

I. GENERAL

1. A detailed account of general conditions and developments relating to Western Sahara was provided in a previous working paper on the Territory (A/AC.109/695).

II. CONSIDERATION BY THE GENERAL ASSEMBLY AT ITS FORTY-SEVENTH SESSION

2. At the forty-seventh session of the General Assembly, reference was made to the question of Western Sahara by a number of representatives during their statements in plenary meetings (see A/47/PV.4-5, 8, 13, 15-24 and 26-29). An account of the Fourth Committee's consideration of the item at the forty-seventh session is given in the related report of the Committee to the Assembly (A/47/648).

3. On 25 November 1992, on the recommendation of the Fourth Committee, the General Assembly adopted without a vote resolution 47/25 on the question of Western Sahara. The resolution reads as follows:

"The General Assembly,

"Having considered the question of Western Sahara,

"Reaffirming the inalienable right of all peoples to self-determination and independence, in accordance with the principles set forth in the Charter of the United Nations and in General Assembly resolution 1514 (XV) of 14 December 1960, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples,

"Recalling its resolution 46/67 of 11 December 1991,

"Recalling also the agreement in principle given on 30 August 1988 by the Kingdom of Morocco and the Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro to the proposals of the Secretary-General of the United Nations and the current Chairman of the Assembly of Heads of State and Government of the Organization of African Unity in the context of their joint mission of good offices,

"Recalling further Security Council resolutions 621 (1988) of 20 September 1988, 658 (1990) of 27 June 1990, 690 (1991) of 29 April 1991, and 725 (1991) of 31 December 1991, relating to the question of Western Sahara,

"Recalling with satisfaction the entry into force of the cease-fire in Western Sahara on 6 September 1991, in accordance with the proposal of the Secretary-General accepted by the two parties,

"Noting with satisfaction the appointment on 23 March 1992 of Mr. Sahabzada Yaqub-Khan as Special Representative of the Secretary-General for Western Sahara,

"Taking note with satisfaction of the section on Western Sahara in the final Declaration of the Tenth Conference of Heads of State or Government of Non-Aligned Countries, held at Jakarta from 1 to 6 September 1992, 1/

"Having examined the relevant chapter of the report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 2/

"Having also examined the report of the Secretary-General, 3/

"1. Takes note with appreciation of the report of the Secretary-General;

"2. Pays tribute to the Secretary-General for his action with a view to settling the question of Western Sahara by the implementation of the settlement plan;

"3. Reiterates its support for further efforts of the Secretary-General for the organization and supervision by the United Nations, in cooperation with the Organization of African Unity, of a referendum for self-determination of the people of Western Sahara, in conformity with resolutions 658 (1990) and 690 (1991) by which the Security Council adopted the settlement plan for Western Sahara;

"4. Endorses the contents of the letter dated 31 August 1992 from the President of the Security Council to the Secretary-General 4/ in which the members of the Council informed the Secretary-General that they shared his views on the necessity of the two parties scrupulously abiding by the cease-fire and abstaining from any provocative behaviour endangering the settlement plan, and expressed their hope that both parties would extend their full cooperation to the Secretary-General and the Special Representative in their efforts to achieve speedy progress in the implementation of the plan and would make extraordinary efforts to ensure the success of the plan;

"5. Requests the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to continue to consider the situation in Western Sahara, bearing in mind the ongoing referendum process, and to report thereon to the General Assembly at its forty-eighth session;

"6. Invites the Secretary-General to submit to the General Assembly at its forty-eighth session a report on the implementation of the present resolution."

1/ See A/47/675-S/24816, annex.

2/ See A/47/23 (Part V), chap. IX.

3/ A/47/506.

4/ S/24504.

III. GOOD OFFICES OF THE SECRETARY-GENERAL

4. An account of a series of contacts and consultations undertaken in 1992 by the Secretary-General in the exercise of his good offices, within the context of General Assembly resolution 46/67 of 11 December 1991, is given in his report of 9 October 1992 to the Assembly at its forty-seventh session (A/47/506). Since the circulation of that report, the Secretary-General, in close cooperation with the current Chairman of the Organization of African Unity (OAU), has continued to exercise his good offices with the parties concerned.

5. In a progress report to the Security Council, the Secretary-General recalled the basic positions of Morocco and the Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro (Frente POLISARIO) regarding the provisions of the settlement plan for Western Sahara. He reported that the opposing points of view of the parties concerning the basic question of the establishment of the electorate largely accounted for their differences. That was made clear in their recent talks with his Special Representative concerning both the interpretation of the criteria and the equally important question of evidence in support of applications for participation in the referendum. 1/

6. In this connection, the report noted that the Frente POLISARIO had emphasized the special importance of written evidence emanating from the Territory, i.e., authentic documents issued by the Spanish authorities in the Territory, while Morocco had emphasized the equal importance, in a nomadic and traditional society, of oral testimonies and official documents, regardless of their source. 1/

7. Since the outcome of these talks was not conclusive, the Secretary-General suggested that his Special Representative undertake further consultations with a view to clarifying certain unresolved questions and to determining with the parties whether a meeting of tribal chiefs such as that organized by the United Nations at Geneva in June 1990 could contribute to the resolution of the problems impeding the implementation of the settlement plan. 1/

8. In a letter dated 8 October 1992, 2/ the President of the Security Council, on behalf of the members of the Council, welcomed the above suggestions and, thereafter, the Special Representative of the Secretary-General decided, in consultation with the parties, to invite 38 Western Saharan tribal chiefs to a consultative meeting on 30 November and 1 December 1992 at the Palais des Nations in Geneva. The participants, of whom 19 had been designated by the Government of Morocco and 19 by the Frente POLISARIO, were to advise the Special Representative on questions relating to the means of identifying persons authorized to participate in the referendum. 1/

9. However, as stated in the Secretary-General's report, 1/ because of differences relating to the powers of some participants designated by the Moroccan party, the consultative meeting had to be cancelled, despite the compromise proposals put forward by the Special Representative to the delegations of both parties at Geneva.

10. In the light of the above, the report 1/ observed that, notwithstanding the prior acceptance of the general provisions of the settlement plan, important substantial disagreements persisted between the parties regarding fundamental

issues and that, despite intensive efforts exerted by the Secretary-General and his Special Representative, it had not been possible to resolve the dilemma that impinged on the very core of the settlement plan. Taking into account these developments, the Secretary-General requested guidance from the Security Council on the following three options:

(a) Continuation and, if possible, intensification of talks;

(b) Immediate implementation of the settlement plan on the basis of the instructions for the review of applications for participation in the referendum appearing in a previous report of the Secretary-General issued in December 1991; 3/

(c) Adoption of an alternative approach not based on the settlement plan.

11. At its 3179th meeting, on 2 March 1993, the Security Council adopted resolution 809 (1993). The resolution reads, inter alia, as follows:

"The Security Council,

"...

"1. Welcomes the report of the Secretary-General on the situation concerning Western Sahara (S/25170);

"2. Invites the Secretary-General and his special representative to intensify their efforts, with the parties, in order to resolve the issues identified in his report (S/25170), in particular those relating to the interpretation and application of the criteria for voter eligibility;

"3. Invites further the Secretary-General to make the necessary preparations for the organization of the referendum of self-determination of the people of Western Sahara and to consult accordingly with the parties for the purpose of commencing voter registration on a prompt basis starting with the updated lists of the 1974 census;

"4. Invites also the Secretary-General to report to the Council as soon as possible and not later than May 1993 on the outcome of his efforts, on the cooperation of the parties and on the prospects and modalities for the holding of the referendum on a free and fair basis with a view that this take place by the end of the current year at the latest, and requests the Secretary-General to include in this report proposals for the necessary adjustments to the present role and strength of the United Nations Mission for the Referendum in Western Sahara (MINURSO);

"5. Urges the two parties to cooperate fully with the Secretary-General in implementing the Settlement Plan which has been accepted by them and approved by the Council in its resolutions 658 (1990) and 690 (1991), and in resolving the issues identified in the Secretary-General's recent report (S/25170), in particular those relating to the interpretation and application of the criteria for voter eligibility;

"6. Decides to remain actively seized of the matter."

12. In pursuance of paragraph 4 of the above resolution, the Secretary-General submitted a further report to the Security Council on 21 May 1993. 4/ The report indicated that the Special Representative of the Secretary-General had travelled to the mission area at the end of March for talks with the parties. Those consultations were essentially aimed at eliciting the views of the parties regarding a possible compromise to bridge existing differences over the interpretation and application of the eligibility criteria enunciated in a previous report of the Secretary-General issued in December 1991. 3/

13. The Special Representative reported that both sides had shown a desire to move towards an early referendum. Some progress had been made in the sense that Morocco had not expressed objections to the main elements of the outline of a proposed compromise and the Frente POLISARIO had, for its part, not rejected the compromise outright, even though it had maintained its earlier reservations about the crucial aspects of the criteria, namely the testimony in support of the eligibility of applicants to vote. 4/

14. Against this background and in response to the calls from the parties as well as from several members of the Security Council, the Secretary-General decided to visit the mission area in the first week of June 1993, accompanied by his Special Representative, to make one more effort to seek a compromise solution. 4/

15. Pending that visit, discussions were held with the parties during the months of March and April concerning a number of relevant issues. Both sides confirmed their desire to proceed promptly with the registration of voters and to cooperate with the United Nations Mission for the Referendum in Western Sahara (MINURSO) in this task. It was also decided to establish an Identification Commission, commencing with a nucleus of about 10 members, which would start voter registration, initially in Laayoune and Tindouf in June 1993. 4/

16. In a letter dated 28 May 1993, 5/ the President of the Security Council informed the Secretary-General that the latter's interim report on Western Sahara 4/ had been brought to the attention of the members of the Security Council and that the Council welcomed his decision to visit the region in the first week of June. The members of the Security Council also welcomed the establishment of the Identification Commission and expressed the hope that it would complete its work as soon as possible.

17. The Secretary-General, accompanied by his Special Representative for Western Sahara, visited the mission area from 31 May to 4 June 1993. In Morocco, the Secretary-General had discussions with Mr. Abdellatif Filali, Minister of State for Foreign Affairs and Cooperation of Morocco, and was received by King Hassan II on 2 June 1993. Both sides considered the talks positive and constructive.

18. On 3 June 1993, at a press briefing held at United Nations Headquarters, it was announced that the Secretary-General had had a working session in Algiers with Mr. Redha Malek, Minister for Foreign Affairs of Algeria, on the question of the implementation of Security Council resolution 809 (1993) regarding the criteria for registration in the referendum. The Secretary-General had also been received by Mr. Ali Kafi, President of the High Council of State. The

Secretary-General had described the talks as positive, adding that they had discussed African issues of concern, in particular the question of Western Sahara and the implementation of Security Council resolution 809 (1993). Further, the Secretary-General was to meet with Mr. Belaid Abdesselam, Prime Minister of Algeria.

19. According to a press briefing held on 4 June 1993, the Secretary-General then proceeded to Tindouf where he was received at the Rabouni refugee camp by the POLISARIO leadership on 4 June. The Secretary-General held talks with Mr. Mohammed Abdul Aziz, Secretary-General of the Frente POLISARIO, and with the Minister of Defence and the Minister for Foreign Affairs, during which he emphasized the importance of speedy implementation of Security Council resolution 809 (1993).

20. The Secretary-General's visit to the mission area was aimed at urging the parties to accept a compromise solution on the interpretation and application of the criteria for voter eligibility. During that visit, the Secretary-General presented to the parties - the Moroccan Government and the Frente POLISARIO leadership - a set of compromise proposals and requested them to respond to the proposals as soon as possible so as to allow him to submit his report to the Security Council in pursuance of resolution 809 (1993).

21. On 9 June 1993, it was announced at a press briefing that, after the conclusion of the Secretary-General's meetings in Algiers and Tindouf, his Special Representative had returned to Morocco to continue efforts to bring the two sides closer together and to work towards implementation of resolution 809 (1993) on Western Sahara. On 9 June, the Secretary-General was briefed by the Special Representative in Paris on his meeting with King Hassan II of Morocco and his talks with senior members of the Moroccan Government.

22. On 16 June 1993, it was announced at a press briefing at Headquarters that the Secretary-General had had meetings in Vienna with Mr. Mustafa Bachir Sayed, Frente POLISARIO Coordinator with MINURSO.

23. In his address to the Assembly of Heads of State and Government of the Organization of African Unity at its twenty-ninth ordinary session, held at Cairo, on 28 June 1993, the United Nations Secretary-General stated the following on the question of Western Sahara:

> "In Western Sahara, the United Nations Mission for the Referendum in Western Sahara (MINURSO) has now been in operation for two and a half years. Although the settlement plan called for the referendum to be held in January 1992, a firm date for the referendum has still not yet been fixed. In March, the Security Council signalled its growing impatience with the slow pace of negotiations over the organization of the referendum, and set a deadline of the end of this year for the referendum to take place.
>
> "Preparations for the referendum are being speeded up. In response to the Security Council's action, my Special Representative Sahabzada Yaqub-Khan, travelled to the mission area at the end of March for talks with the parties. On his return to New York, Mr. Yaqub-Khan reported to me that both Morocco and the Frente POLISARIO had shown a desire to move

towards an early referendum. Against this background, and in response to calls from the parties, I visited the mission area in the first week of June in order to help to reach a compromise solution on the remaining issues, and also to underscore the importance of implementing the settlement plan without further delay.

"I am pleased to report to you that as a result of these negotiations the differences between the parties have been substantially narrowed. I am optimistic that agreement on the terms of reference for the referendum will soon be reached, and that this will help to generate momentum for the holding of the referendum at an early date.

"In the meantime, preparations are continuing. The initial deployment of civilian police officers to Western Sahara has now taken place, and the full deployment will proceed as required. A 10-member Identification Commission for the referendum has now been established, and after the completion of essential preparatory activities, the Commission will begin voter registration. Although it is now apparent that the budget of $143 million, which was approved by the General Assembly in May of 1991, will require additional support, I am hopeful that the concrete steps now under way will persuade the General Assembly to allocate the needed additional resources." 6/

IV. POLITICAL AND OTHER DEVELOPMENTS

24. The Tenth Conference of Heads of State or Government of Non-Aligned Countries, held at Jakarta, from 1 to 6 September 1992, noted that encouraging progress had been made in resolving the question of Western Sahara. The Conference expressed its full support for the efforts of the Secretary-General of the United Nations to organize and supervise a referendum in accordance with Security Council resolutions. 7/

25. In a statement at the forty-seventh session of the General Assembly on 21 September 1992 (A/47/PV.4), Mr. Abdellatif Filali, Minister of State for Foreign Affairs and Cooperation of Morocco, said that the so-called question of Western Sahara had entered its final phase following the adoption of the United Nations peace plan in 1988 and following the establishment of the cease-fire in September 1991. Since that time, the Security Council had given firm and complete support to the implementation by the Secretary-General and his Special Representative of the settlement plan and of the instructions devised for the organization of the United Nations referendum. Despite the numerous delays that had interfered with the holding of the referendum - something which his country deplored - Morocco had continued to adhere firmly to the settlement plan and to the commitments it had undertaken. Moreover, as underlined by the Secretary-General in his report of 20 August 1992 (S/24464), his country continued to extend its full cooperation to the establishment of the mechanisms envisaged and the implementation of the rules agreed upon with a view to organizing the referendum as soon as possible. In that context, Morocco hoped that realism would prevail over obstructionism and procrastination.

26. Speaking as a petitioner at the 4th meeting of the Fourth Committee on 19 October 1992 (A/C.4/47/SR.4), a representative of the Frente POLISARIO,

recalling Security Council resolutions 658 (1990) and 690 (1991), said that the sole basis for a referendum of self-determination was the 1974 census. A margin of error was of course expected. However, instead of a margin of 1 to 5 per cent, Morocco was speaking of a margin of 225 per cent and had come out with a list of 170,000 Moroccan nationals whom it intended to have added to the electoral roll.

27. Furthermore, Morocco had taken a whole series of actions that ran counter to the settlement plan: 170 cease-fire violations; an intensification of the repression of the Saharan civilian population despite the United Nations presence; the organization of elections in which Western Sahara was considered an integral part of the Kingdom of Morocco; and so on. All were measures which, to judge by the reactions of the international press, the United States Senate and the European Parliament, had aroused concern and uncertainty. Worse yet, in his report of 19 December 1991, the former Secretary-General, to satisfy Morocco and without the knowledge of the POLISARIO party, had introduced a number of principles contrary to the main clause of the settlement plan, a dismaying step that was unacceptable.

28. The Special Representative of the Secretary-General had undertaken a mediation mission with the intention of bringing the positions of the two parties closer together, but after five months of indirect negotiations, all that he had been able to do was to note the wide divergence of views on principles unconnected with the 1974 census, such as the impartial and independent verification of applications from Moroccan subjects whose ancestors had been born in Western Sahara, in some cases at the beginning of the century, or who had resided for 6 to 12 years in the Territory between 1884 and 1974. Underscoring the responsibility of Morocco, which persisted in seeking a referendum rigged from the start, he appealed to the international community to ensure the success of the process that was under way, because failure could only seriously undermine the credibility of the United Nations. He also called upon the Moroccan leaders not to fail to seize the historic opportunity offered to them to help to establish peace, democracy and development in the region.

29. At its 8th meeting, on 3 November 1992, the Fourth Committee adopted, without a vote, draft resolution A/C.4/47/L.2 on the question of Western Sahara. On 25 November 1992, on the recommendation of the Fourth Committee, the General Assembly adopted the draft resolution without a vote as resolution 47/25 (see para. 3).

30. On 11 November 1992, at a press conference held by Morocco at United Nations Headquarters, the Permanent Representative of Morocco to the United Nations told correspondents, inter alia, that Mr. Ibrahim Hakim, an ambassador-at-large of Morocco, had been active in the preparation of the referendum and that, in this connection, he had succeeded in arranging a meeting of the tribal chiefs.

31. In a letter dated 14 December 1992 addressed to the Secretary-General, the Chargé d'affaires a.i. of the Permanent Mission of Algeria to the United Nations transmitted to the Secretary-General the position of his country in its capacity as an observer of the process for the settlement of the conflict in Western Sahara, following the cancellation of the meeting of tribal chiefs from Western Sahara that was to have been held on 30 November and 1 December 1992. In its

communication, Algeria stated that it had learned with great disappointment that the meeting of tribal chiefs from Western Sahara that was to have been held at Geneva did not take place. It was most unfortunate that, by once again calling into question the previously established framework for that meeting, a new stumbling block had been added to the difficulties already encountered in the implementation of the settlement plan. Algeria further stated: "It would be highly desirable for every effort to be made to bring Morocco and the Frente POLISARIO to honour the commitments they have made to allow the Special Representative, under the authority of the Secretary-General of the United Nations, to implement the settlement plan in its entirety as originally conceived by the United Nations and accepted by both parties. Algeria, for its part, will continue to support, as it has thus far, the efforts of the Secretary-General and his Special Representative to find a just and lasting settlement to the conflict in Western Sahara." 8/

32. In a letter dated 19 December 1992, the Permanent Representative of Morocco to the United Nations informed the President of the Security Council that his Government had learned with astonishment of the allegations of the other party concerning the circumstances relating to the meeting scheduled for 30 November and 1 December 1992 between the chiefs of the Saharan tribes. He said that the delegation of the other party had clearly refused to accept the practical arrangements the United Nations had graciously suggested to the two parties, thereby displaying its negative attitude towards its participation at that meeting. Likewise, its refusal to reply to the Special Representative's invitation to attend an initial informal contact meeting on the eve of the official meeting said a great deal about its intentions and its determination to obstruct progress. In any event, it was for the Special Representative alone to determine whether the delegations sent by the two parties met the United Nations criteria. 9/

33. The Permanent Representative also referred to the letter of 14 December 1992 from the Chargé d'affaires a.i. of the Permanent Mission of Algeria to the United Nations concerning the meeting of tribal chiefs. 8/ In that connection, he noted that, in the absence of objective information - as Algeria had not been invited to observe the Geneva meeting - it was unable to make relevant comments on the circumstances of that meeting without risking the loss of impartiality. Morocco did note, however, with satisfaction the following points. Quoting from the aforementioned letter (see also para. 31), Morocco noted Algeria's desire for the two parties to honour their commitments in connection with the implementation of the settlement plan as originally conceived by the United Nations and accepted by both parties, and to continue to support the efforts of the Secretary-General and his Special Representative to find a lasting settlement to the conflict in Western Sahara. 9/

34. Speaking on the question of Western Sahara at the opening session of the Special Committee on 10 February 1993, the Secretary-General stated that Western Sahara continued to be of concern to the international community. In this regard, he was pursuing the work of his predecessor, Mr. Javier Pérez de Cuéllar. As indicated in the reports that he had regularly submitted to the Security Council, which continued to be seized of the question, he had endeavoured to iron out the difficulties that could hinder the implementation of the settlement plan, which provided for the organization and holding by the United Nations of a referendum on self-determination in Western

Sahara. He had spoken several times with all the interested parties, and his Special Representative for Western Sahara had made several trips to the region for the purpose of consultation and dialogue. His most recent report to the Council took stock of the situation and proposed a number of options for overcoming the current deadlock (A/AC.109/PV.1412).

35. On 26 February 1993, the Commission on Human Rights meeting at Geneva, adopted, without a vote, resolution 1993/17 on Western Sahara, similar in content to General Assembly resolution 47/25. 10/

36. In a letter dated 4 March 1993 addressed to the Secretary-General, the Chargé d'affaires a.i. of the Permanent Mission of Algeria to the United Nations transmitted the position of his country as an observer State to the process of settling the conflict in Western Sahara, following the adoption by the Security Council of resolution 809 (1993). The communication stated that Algeria had taken note of Security Council resolution 809 (1993) on the question of Western Sahara. Algeria strongly hoped that Morocco and the Frente POLISARIO would demonstrate the necessary will and cooperate in good faith in resolving those questions inasmuch as no viable solution was possible in the absence of agreement between the parties. 11/

37. Algeria reiterated the position it stated on 26 December 1991 12/ to the effect that the introduction of new elements not agreed to by both parties would be incompatible with the spirit and letter of the settlement plan and could jeopardize the process for settling the dispute concerning Western Sahara. It expressed the hope that the Security Council would continue to ensure that its integrity was preserved and that the settlement plan was not misconstrued either in content or purpose, namely, the free exercise by the people of Western Sahara of its right to self-determination. Algeria noted with regret the omission, for the first time, of any reference to the role of OAU in the organization and supervision of the referendum for self-determination in Western Sahara that had been conceived precisely in the framework of their joint mission of good offices. It would continue to make its contribution towards the implementation of the full settlement plan as accepted by the two parties and unanimously approved by the Security Council. 11/

38. On 15 June 1993, it was reported that Mr. Mustafa Bachir Sayed, Frente POLISARIO Coordinator with MINURSO, stated in Vienna that the document presented to the two sides as a draft compromise solution was, in fact, not final, because the final reply required numerous clarifications and answers to numerous questions raised by many formulations and ideas that were not easy from the very outset. Frente POLISARIO considered the document as a basis for intensifying the discussion and the negotiations between the two sides. A basis sometimes required improvement and modification and clarification on many occasions. 13/

39. On 21 June 1993, it was reported that Frente POLISARIO had made a significant concession the day before, declaring it no longer had "reservations" about United Nations criteria regarding who should vote in a referendum on the future of the Territory. Mr. Mustafa Bachir Sayed said that Frente POLISARIO had "no more reservations about the criteria drawn up by Mr. Javier Pérez de Cuéllar". 14/

40. On 1 July 1993, it was reported that the Secretary-General had announced that officials from Morocco and the Frente POLISARIO would meet at Laayoune on 15 July to negotiate the terms of a referendum in Western Sahara. He also reportedly stated that neither side had yet fully accepted a United Nations compromise proposed earlier that year to solve the dispute, adding that, should the Security Council so decide, the compromise could be imposed without the approval of the two sides. 15/

Notes

1/ S/25170.

2/ S/24645.

3/ S/23299, annex.

4/ S/25818.

5/ S/25861.

6/ See United Nations press release SG/SM/5029, 28 June 1993.

7/ A/47/675-S/24816, annex.

8/ A/47/787-S/24966.

9/ S/24999.

10/ See Official Records of the Economic and Social Council, 1993, Supplement No. 2 (E/CN.4/1993/L.11/Add.2).

11/ A/48/95-S/25364.

12/ S/23323.

13/ FBIS-NES-93-113, 15 June 1993.

14/ Agence France-Presse dispatch, Algiers, 21 June 1993.

15/ Reuters dispatch, Geneva, 1 July 1993.

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/AC.109/1164
9 July 1993

ORIGINAL: ENGLISH

SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES

GIBRALTAR

Working paper prepared by the Secretariat

CONTENTS

		Paragraphs	Page
I.	GENERAL	1 - 2	3
II.	ACTION BY THE GENERAL ASSEMBLY	3	3
III.	CONSIDERATION BY THE SPECIAL COMMITTEE	4 - 7	4
IV.	POLITICAL DEVELOPMENTS	8 - 29	4
	A. General	8 - 10	4
	B. General elections	11	4
	C. Future status	12 - 25	5
	D. Other developments	26 - 28	8
	E. Public service	29	8
V.	ECONOMIC CONDITIONS	30 - 50	8
	A. General	30	8
	B. Public finance	31 - 36	9
	C. Trade	37 - 39	10

CONTENTS (continued)

		Paragraphs	Page
	D. Investment, finance and banking	40 - 41	10
	E. Transportation, communications and utilities	42 - 48	11
	F. Tourism	49 - 50	12
VI.	SOCIAL AND EDUCATIONAL CONDITIONS	51 - 75	12
	A. Labour	51 - 53	12
	B. Human rights and the status of women	54 - 57	12
	C. Crime and crime prevention	58 - 60	13
	D. Environment	61 - 63	13
	E. Housing	64 - 66	14
	F. Public health	67 - 71	14
	G. Education	72 - 75	15

Annexes

I.	Joint press conference with Foreign Secretary, Mr. Douglas Hurd, in Madrid	18
II.	Action brought on 19 April 1993 by the Government of Gibraltar and the Gibraltar Development Corporation against the Council of the European Communities*	24
III.	Opinion of Mr. Advocate General Lenz delivered on 4 May 1993*	27
IV.	Judgment of the Court, 29 June 1993*	61

* At the time of preparation of the present report, available in English only.

GIBRALTAR 1/

I. GENERAL

1. Gibraltar is a narrow peninsula extending southward from the south-west coast of Spain, to which it is connected by an isthmus about 1.6 kilometres long. The Spanish port of Algeciras lies 8 kilometres across the bay to the west; the continent of Africa is situated 32 kilometres across the strait to the south. According to the United Kingdom of Great Britain and Northern Ireland, the area of Gibraltar is 5.86 square kilometres, and according to Spain, it is 4.80 square kilometres.

2. According to the Census of Gibraltar taken on 14 October 1991, Gibraltar's civilian population in 1991 was 28,074, comprising 20,022 Gibraltarians, 5,182 other British subjects (including families of British servicemen stationed in Gibraltar, but excluding servicemen) and 2,870 aliens.

II. ACTION BY THE GENERAL ASSEMBLY

3. On 25 November 1992, the General Assembly adopted the following decision on the question of Gibraltar without a vote (decision 47/411):

> "The General Assembly, recalling its decision 46/420 of 11 December 1991 and recalling at the same time that the statement agreed to by the Government of Spain and the United Kingdom of Great Britain and Northern Ireland at Brussels on 27 November 1984,* stipulates, inter alia, the following:
>
> > 'The establishment of a negotiating process aimed at overcoming all the differences between them over Gibraltar and at promoting cooperation on a mutually beneficial basis on economic, cultural, touristic, aviation, military and environmental matters. Both sides accept that the issues of sovereignty will be discussed in that process. The British Government will fully maintain its commitment to honour the wishes of the people of Gibraltar as set out in the preamble of the 1969 Constitution',
>
> "takes note of the fact that, as part of this process, the Ministers for Foreign Affairs have held annual meetings alternately in each capital, and urges both Governments to continue their negotiations with the object of reaching a definitive solution to the problem of Gibraltar in the light of relevant resolutions of the General Assembly and in the spirit of the Charter of the United Nations."

"* A/39/732, annex.

III. CONSIDERATION BY THE SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES

4. The Special Committee considered the question of Gibraltar at its 1406th meeting on 28 July 1992.

5. At the same meeting, with the Special Committee's consent, the Honourable Joe Bossano, Chief Minister of Gibraltar, made a statement in which inter alia, he emphasized that "in the case of Gibraltar there is the same right to self-determination as there is in the case of any other Non-Self-Governing Territory"... (A/AC.109/PV.1406).

6. At the same meeting, the representative of Spain reiterated the position of his Government on the question of Gibraltar (A/AC.109/PV.1406).

7. Also at its 1406th meeting, the Special Committee decided without objection to continue its consideration of the item at its next session, subject to any directives that the General Assembly might give in that connection at its forty-seventh session and, in order to facilitate consideration of the item by the Fourth Committee, to transmit the relevant documentation to the Assembly (A/AC.109/PV.1406).

IV. POLITICAL DEVELOPMENTS

A. General

8. The 1969 Constitution of the Territory remains in effect. 2/ It provides for a single House of Assembly consisting of 15 elected members, together with a Speaker, the Attorney-General and the Financial and Development Secretary as ex officio members. Executive authority is vested in the Governor, who is responsible for defence, external affairs, internal security and all matters that are not expressly defined as being of domestic concern.

9. In March 1993, Sir John Chapple was appointed as Governor of Gibraltar. He succeeded Sir Derek Reffell who held that position from 1989 to 1993. 3/

10. According to press reports, 4/ on 22 March 1993, Sir Derek Reffell, then Governor of Gibraltar, speaking in a personal capacity, stated that "the 1969 Constitution of Gibraltar needed to be updated". His statement was supported by the Gibraltar National Party (GNP) whose representatives emphasized the necessity of revising several articles of the Constitution, specifically those concerning the appointed members of the House of Assembly, the Governor's reserved powers and the electoral legislation.

B. General elections

11. It will be recalled that the General elections for the 15 seats in the House of Assembly were held on 17 January 1992. The Gibraltar Socialist Labour Party (GSLP) received 73.07 per cent of the votes, winning eight seats; while

the Gibraltar National Party (GNP), with 4.66 per cent of the votes, failed to obtain an Assembly seat. 5/ Mr. Joe Bossano, the leader of GSLP, received 9,228 votes and thus was re-elected Chief Minister of Gibraltar. The leader of GSD, Mr. Peter Caruana, who obtained 3,065 votes, became leader of opposition. 6/

C. Future status

12. In his address to the General Assembly on 25 September 1992 (see A/47/PV.13), Mr. Javier Solana Madariaga, Foreign Minister of Spain stated:

> "There is one issue whose importance for Spain is well known: the decolonization of Gibraltar. I wish to restate my Government's determination to continue, with dedication and in a constructive spirit, the negotiating process with the United Kingdom established by the Brussels Declaration of 27 November 1984, bearing in mind the doctrine of the General Assembly that this is not a case of self-determination but a situation that affects the territorial integrity of Spain. I trust that the negotiating efforts of both Governments will soon lead to a definitive solution that, while taking into account the legitimate interests of the people, will put an end to the colonial status of Gibraltar - a status that is clearly anachronistic and inappropriate to the times in which we live, especially since the General Assembly's proclamation of the International Decade for the Eradication of Colonialism until the year 2000."

13. Mr. Douglas Hurd, Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, made no reference to Gibraltar in his address to the General Assembly on 22 September 1992 (see A/47/PV.6).

Position of the Government of Gibraltar

14. The Chief Minister of Gibraltar, Mr. Joe Bossano, outlining the position of his Government in 1993 New Year's Message, 7/ referred to his statement before the United Nations Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (also see para. 5 above and A/AC.109/PV.1406), pointing out that "it had been the first time that Gibraltar had made a direct representation to the United Nations." He further stated that the question of application of the European Community legislation to Gibraltar was "a matter of urgency". He expressed satisfaction with an agreement reached between Gibraltar and the United Kingdom in 1992, according to which "the laws of Gibraltar are exactly the same as the laws of the United Kingdom for the European Community purposes". Addressing the issue of Gibraltar's status, Mr. Joe Bossano stated that the transposition of European Community (EC) laws into Gibraltar's legislation by means of Gibraltar's own decision-making would enable the Territory to become "the equivalent of any of the twelve member states" of EC. The Chief Minister confirmed that his Government had been continuing the dialogue with the United Kingdom regarding Gibraltar's constitutional development. He expressed the hope that should that dialogue continue satisfactorily, the basis for a new constitutional relationship between the United Kingdom and Gibraltar which "would take full account of Gibraltar's status within the European Community" could be achieved by 1996. Mr. Bossano

reiterated his Government's position that Gibraltar's "relations with Spain were important" and that it was necessary to continue to pursue the efforts to "improve those relations without in any way watering down the firm stand on fundamentals". He deplored the fact that Spain continued to use the Treaty of Utrecht as reference for Gibraltar's status. Among important political developments, the Chief Minister mentioned the commemoration on 10 September 1992, of the twenty-fifth anniversary of the 1967 referendum in Gibraltar. In this connection, he announced that beginning in 1993, 10 September would become Gibraltar's new National Day entitled the Referendum Day.

15. According to press reports, 8/ Mr. Peter Caruana, the Leader of the Opposition in the House of Assembly stated that his party, the Gibraltar Social Democrats (GSD), would continue to probe "the nature of the Government's discussions with the United Kingdom Foreign Office over Gibraltar's status and its European Community standing while those exchanges continued to be secret". He underlined that GSD "had publicly stated its support for Mr. Bossano's efforts to wrestle from Great Britain the confirmation of the right to regulate the implementation of the European Community directives locally, as part and parcel of the constitutional right to legislate domestic matters." He also said that GSD was, however, "not prepared to be party to the misconceived idea that it somehow makes Gibraltar the thirteenth Member State of the European Community".

16. According to press reports, 9/ Mr. Joseph Garcia, leader of the Gibraltar National Party (GNP) made a presentation to the Chairman of the Civil Liberties Committee of the European Parliament regarding the fact that "the Gibraltarians are the only citizens of Europe who do not have the right to vote in elections to the European Parliament, even though Gibraltar has been in the European Community for 20 years". The Chairman assured the GNP leader that the Committee "will deal, in some way or another, with the right to vote in European elections".

Anglo-Spanish negotiation process

17. The negotiating process established by the Brussels Joint Communiqué of 27 November 1984 was aimed at overcoming all differences over Gibraltar by promoting cooperation between the parties concerned, on a mutually beneficial basis, as well as by discussing the issues of sovereignty.

18. It will be recalled that the United Kingdom reportedly maintained that since Gibraltar was part of the European Community under article 227 of the Treaty of Rome, exempting Gibraltar from the External Frontiers Convention (EFC) or making its inclusion subject to a bilateral frontiers agreement would be contrary to Gibraltar's status within the European Community (see A/AC.109/1074 and Corr.1, para. 15). The Foreign Affairs Committee of the Congress of Deputies of Spain, at its meeting on 2 October 1991, adopted the following non-legislative proposal submitted by the "Grupo Parlamentario de Izquierda Unida-Iniciativa por Catalunya" (Ref. No. 161/265), which was unanimously approved by all parliamentary groups:

> "The Congress of Deputies urges the Government not to sign agreements on the external frontiers of the European Community that

might imply the perpetuation of its current status or detriment to the position of Spain in the negotiations to bring about the decolonization of Gibraltar and its reincorporation into the territory of Spain."

19. On 1 March 1993, in Madrid, the Foreign Minister of Spain and the Secretary of State for Foreign and Commonwealth Affairs gave a joint press conference regarding the status of the Anglo-Spanish negotiations. The text of the press conference is contained in annex I to the present report.

Airport Agreement

20. According to the administering Power, the United Kingdom and Spain had agreed, subject to the necessary legislation being in place, to the development of Gibraltar airport jointly coordinated by the British and Spanish authorities; the British Government had made clear at the time that they could not impose it on Gibraltar if the latter did not wish to implement it. (See also A/AC.109/1007, paras. 22 and 23; and A/AC.109/1074 and Corr.1, paras. 17-23).

21. The Foreign Minister of Spain has reportedly also stated that the Airport Agreement, as well as the EC civil aviation legislation related thereto, would remain valid without time limitation and would continue to impede the opening of the airport of Gibraltar for European communications. He further expressed his belief that the population of Gibraltar would sooner or later become aware of the grave consequences of that situation. He also referred to the non-legislative proposal regarding the agreement on the external frontiers of EC adopted by the Spanish Congress of Deputies 10/ (see para.18).

22. During the period under review, the Airport Agreement continued to be a major issue of the Anglo-Spanish negotiations. According to press reports, both parties maintained their positions on the question of the implementation of that Agreement. 11/

23. An action against the Council of the European Communities was brought before the Court of Justice of the European Communities on 19 April 1993 by the Government of Gibraltar and the Gibraltar Development Corporation represented by Ian S. Forrester, Queen's Counsel at the Scots Bar, Richard O. Plender, Queen's Counsel at the Bar of England and Wales and Alasdair R. M. Bel, Solicitor, Scotland, acting on the instructions to Messrs. Forrester Norall & Sutton, with an address for service in Luxembourg at the Chambers of Maître Marc Loesch, 8 rue Zithe. Details of the case are contained in annex II to the present report.

24. On 4 May 1993, Mr. Otto-Carl Lenz, Advocate-General of the Court of Justice of the European Communities, laid his opinion regarding Case C-168/93. Details of the opinion are contained in annex III to the present report.

25. On 29 June 1993, the European Court of Justice declared the case as inadmissible (see annex IV to the present report).

D. Other developments

26. According to press reports in January 1993, 12/ Rear Admiral Jeremy Sanders, Commander, British Forces, Gibraltar, announced the closure of the Royal Navy Reserve Unit in Gibraltar as of March 1993. Rear Admiral Sanders explained that the closure was part of a continuing process of evolution of the United Kingdom's new defence strategy, also known as "Defence of the 90s", a result of the changes that had taken place in East-West relations. He emphasized, however, Gibraltar's continued importance as a staying post for the Royal Navy and pointed to the use being made of that post by the recently created Bosnia Task Force.

27. According to press reports, 13/ three vessels from the 22nd United States Marine Expeditionary Unit, USS Austin, USS Le Moure County, and USS Gunston Hall, visited Gibraltar from 22 to 25 November 1992, with a view to carrying out joint military training together with the Gibraltar Regiment.

28. According to press reports, on 22 September 1992 Spain withdrew its military contingent which had been protecting the border between Spain and Gibraltar for 288 years. Reportedly, that decision was taken by the Spanish Government following the withdrawal of the United Kingdom military contingent which had been guarding the same border. 14/

E. Public service

29. The Public Service Commission, consisting of five members, advises the Governor on appointments as well as on the removal and discipline of public officers. Appointments to higher offices are made by the Secretary of State for Foreign and Commonwealth Affairs. The principal executive officers are the Deputy Governor, the Administrative Secretary, the Attorney-General and the Financial and Development Secretary.

V. ECONOMIC CONDITIONS

A. General

30. Gibraltar has no known natural resources and lacks agricultural land. The industries, trades and services in the Territory are mainly involved in supplying the needs of its population, as well as the large number of visitors who go to the Territory. The economy of Gibraltar is chiefly dependent on tourism and the provision of financial services such as banking, insurance, shipping and portfolio management. The Territory's per capita gross domestic product for 1990/91 was estimated at £8,271 and the per capita gross national product at £8,486, compared with 1989/90 indicators of £6,503 and £6,723, respectively. The inflation rate which was 7.8 per cent in 1991 had dropped to 5.9 per cent by the end of 1992. 15/

B. Public finance

31. Revenue for fiscal year 1990/91 totalled £90.8 million. The main sources of revenue were income derived from income tax (£33.8 million) and from indirect taxation (£23.7 million). Income tax is charged on income arising or received in or derived from Gibraltar. Dividends, interest, pensions and emoluments of office accruing in, derived from or received outside Gibraltar by an individual ordinarily resident in Gibraltar are also taxable. Income tax rates applicable to residents range from 20 per cent on the first £1,500 of taxable income to 50 per cent after the first £19,500. Estate duty is levied on a sliding scale ranging from 5 per cent on an estate valued at £20,000 to £40,000 to 25 per cent on estates exceeding £100,000 in value. Estates which are valued under £20,000 are tax-exempt.

32. Recurrent expenditure for fiscal year 1990/91 amounted to £67.3 million. In addition, consolidated fund charges totalled £28.9 million, of which £18.2 million were public debt charges. The main items of expenditure were education and sports (£8.8 million), public works (£6.5 million) and electricity undertaking (£6.5 million).

33. Capital expenditure is financed through the Improvement and Development Fund. During the 1989/90 and 1990/91 fiscal years, the main items of capital expenditure were as follows:

Capital expenditure

	1989/90	1990/91
	(millions of pounds)	
Crown lands	8.3	8.8
Housing	1.7	6.0
Telephone services	1.5	-
Electricity services	-	1.1
	11.5	15.9

34. Actual government expenditure on capital projects for the period from 1988 to 1991 was as follows:

	1988/89	1989/90	1990/91
	(thousands of pounds)		
Housing	1 159	1 469	3 878
Education	437	1 109	584
Amenities and tourism	176	5	0
Miscellaneous	748	1 240	1 525
Additional projects	6 857	11 037	10 044
	9 377	14 860	16 031

35. At 31 March 1991, the public debt of Gibraltar stood at £33.6 million.

36. The legal tender of the Territory is the pound sterling. Gibraltar Government currency notes of £50, £20, £10, £5 and £1 denominations as well as

Gibraltar Government coinage are legal tender. The notes in circulation on 31 March 1991 amounted to £12.12 million.

C. Trade

37. The total amount of imports and exports for the years 1989 to 1991 were as follows:

	Total imports	Total exports
	(millions of pounds)	
1989	200.5	76.1
1990	266.4	101.7
1991	278.9	70.1

38. Approximately 31 per cent of of Gibraltar's non-fuel imports originate from the United Kingdom. Japan, Spain and Denmark are the Territory's other main sources of supplies. In 1991, foodstuffs accounted for approximately £27 million or almost 10 per cent of Gibraltar's total imports.

39. During the period under review, exports of goods of local origin remained negligible and the Territory continued to depend on the entrepôt trade consisting of re-exports of petroleum and petroleum products supplied to shipping.

D. Investment, finance and banking

40. During 1991, a substantial number of new companies were registered in Gibraltar under the Companies (Taxation and Concession) Ordinance. By the end of that year, a total of 12,390 companies were registered in the Territory compared to 9,717 on 31 December 1990. These business concerns are exempted from the payment of income tax, irrespective of the amount of profits made and whether or not these profits are received in the Territory. The exemption also applies to dividends, interests and directors' fees and annual payments made to non-residents. Shares and debentures held in an exempt company are also not liable to estate duty in the Territory. Unless otherwise authorized, the above concerns may not carry on trade or conduct business in Gibraltar, and no Gibraltarian or resident of the Territory may have any beneficial interest in such a company's shares.

41. Owing largely to tax exemptions, Gibraltar has also become a substantial source of investment in real estate in Spain, with a large number of Gibraltarians either living or owning property in that country and many of the foreigners residing in southern Spain using the Territory for their banking needs. At the end of December 1991, there were 31 banks licensed in Gibraltar. It has been estimated that, during the past four years, the value of deposits in banks based in the Territory has tripled. 16/

E. Transportation, communications and utilities

42. Gibraltar has approximately 43 kilometres of roads, including some 13 kilometres in the city proper. Five bus routes serviced by 16 buses maintain communication between all parts of the city, and the north and south districts. As at 31 December 1991, a total of 30,319 vehicles were registered in the Territory.

43. In 1991, a total of approximately 97,000 persons arrived in the Territory by air and 64,000 by sea. Gibraltar Airways maintains daily scheduled services to the United Kingdom and to Morocco. Most passengers arriving by sea in the Territory arrive by cruise ship or from the Moroccan port of Tanger. As reported previously (see A/AC.109/1116, paras. 29-30), negotiations to resume the ferry service between Gibraltar and the Spanish port of Algeciras have not been successful.

44. Airmail is dispatched by direct flight to London and via London to all destinations world wide six times a week. Letters and parcels by surface mail to and from the United Kingdom are received and dispatched via the land border five times a week.

45. Telecommunications services in the Territory are provided by Gibraltar Telecommunications, Ltd. The local telephone system is operated by Gibraltar Nynex Communications, Ltd., a joint-venture company formed in May 1990 between the Government of Gibraltar and the Nynex International Company of the United States of America. In 1990, a new digital system and exchange became operational with a capacity of 14,000 lines. By the end of the following year, the capacity had increased to 16,000. The total number of telephone stations in December 1991 amounted to 17,867, an increase of 1,108 over 1990.

46. The Electricity Department of the Government of Gibraltar continued to be responsible for the electricity supply of the Territory. During the period under review, the maximum recorded electricity demand was 20,100 kilowatts and a total of 91,555,050 kilowatt-hours were generated.

47. Four newspapers and periodicals are published in the Territory: Gibraltar Chronicle, a daily newspaper which appears only in the English language; and Panorama, The People and Vox, weekly periodicals which are published in English and Spanish languages.

48. Since its establishment in 1963, the Gibraltar Broadcasting Corporation (GBC) has been responsible for providing radio and television services to the Territory. GBC Radio (Radio Gibraltar) broadcasts in English and Spanish 24 hours a day. In addition to live and locally recorded programmes, transcriptions and relays by the British Broadcasting Corporation are also used. GBC Television operates for 18 hours a day in English. At the end of 1991, there were 7,898 licensed television sets in Gibraltar. Radio sets do not need to be licensed.

F. Tourism

49. During the period under review, for the first time since the full opening of the border with Spain in February 1985 Gibraltar witnessed a substantial decrease in the total number of tourist arrivals. By the end of 1991, 4,070,225 visitors had entered the Territory, compared to 4,373,258 in 1990. During 1991, hotels registered a 33.3 per cent decrease in occupancy.

50. According to press reports, in order to stem this decline in one of the major sources of revenue for the Territory's economy, the Government has recently launched a tourism campaign primarily aimed at residents of southern Spain. 17/

VI. SOCIAL AND EDUCATIONAL CONDITIONS

A. Labour

51. According to the administering Power, the workforce in Gibraltar amounted to 14,581 at the end of December 1991. The industries with the highest employment levels were the construction industry and the retail trade. At that time, the total number of unemployed stood at 1,062. Unemployment benefits continued to be paid out of the Social Insurance Fund.

52. Since 1978, public sector wages and salaries have been equated at full parity with those in the United Kingdom. At the end of 1991, basic rates of weekly wages in the public sector were as follows: semi-skilled labourer, £139.12; craftsman mate, £142.93; and craftsman, between £166.41 and £175.17. Wages in the private sector generally tend to move in line with the public sector.

53. During the past year, the situation of about 380 unemployed Moroccan workers in the Territory continued to be a source of controversy between the Government of Gibraltar and the Transport and General Workers' Union (TGWU), the main trade union in the Territory to which many of the unemployed workers belong. Most are unskilled workers who have lived in Gibraltar for many years but have poor prospects for re-employment owing to the decline in the construction industry and general adverse economic conditions. 18/ Unemployment benefits are payable from the Social Insurance Fund and are payable to all contributors, including Moroccans, on an equal basis. Moroccans enjoy exactly the same benefits as European Community nationals, or any other contributors to the Social Insurance Fund.

B. Human rights and the status of women

54. The Gibraltar Constitution Order, 1969, guarantees the protection of the fundamental rights and freedoms of the individual and the maintenance of a Supreme Court with unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and with such jurisdiction and powers as are conferred upon it by the Constitution of Gibraltar, or any other law. The courts of law of the Territory consist of a Court of Appeal, a Supreme Court, the Court of First Instance and the Magistrates' Court.

55. The Substantive Law of the Territory is contained in Orders in Council and enactments of the Parliament of the United Kingdom which apply to Gibraltar, as well as in locally enacted ordinances, subsidiary legislation, the common law and the rules of equity in force in the United Kingdom, so far as they are applicable to the Territory.

56. The status of women in Gibraltar, whether married or single, and with or without family responsibilities, is similar to that enjoyed by women in the United Kingdom.

57. The Social Security (Insurance) Ordinance of Gibraltar provides for the payment of a variety of benefits and allowances to expectant mothers and widows. A maternity grant of up to £36 is payable to qualified women for every child born to them. A widow's allowance is payable for the first 13 weeks of widowhood at a standard rate of £56.70 per week; an additional sum of £6.90 per week is payable for each child up to a maximum of four children. Also, a widowed mother's allowance is payable to a widow left with a dependent child when she finishes drawing her widow's allowance at the standard rate of £47.80 per week with an increase of £6.90 weekly for each dependent child. Upon termination of the above-mentioned allowances, a widow's pension of £47.80 per week is payable to qualifying women.

C. Crime and crime prevention

58. According to the administering Power, during 1991, 1,188 minor and 3,605 serious crimes were reported, compared to 1,433 and 3,385, respectively, in 1990. The reported serious crimes were as follows (in brackets are the figures for the same type of offence in 1990): violence against individuals, 437 (641); sexual offences, 30 (21); burglary, 294 (229); robbery, 12 (10); theft, 1,485 (1,386); criminal damage, 705 (615), dangerous drugs, 527 (407); and other offences, 115 (76).

59. There is one correction institution in Gibraltar. It comprises 36 cells, a sick bay, recreation rooms, workshop, classroom, canteen, laundry, kitchen, visit halls, chapel, a library containing over 4,000 books and a small gymnasium. The number of prisoners received in 1991 was 193, the daily average inmate population being 25.94 as compared with 23.35 in 1990. The supervision of the prison is carried out by the Prison Board in accordance with the Prison Ordinance of the Territory.

60. According to press reports, drug seizures in Gibraltar have increased substantially during the past two years. Tobacco smuggling into the Territory has also increased. 19/ In an effort to fight the drug trade, a special drugs unit was formed within the Royal Gibraltar Police. In May 1993, a two-week course dealing with drug law enforcement was also held in the Territory. 20/

D. Environment

61. The Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora has been extended to apply to Gibraltar as a dependent Territory for which the United Kingdom, a contracting party to the Convention,

has responsibility. The Endangered Species (Imports and Exports) Ordinance of 1976 gave effect in the Territory to the provisions of the Washington Convention. The Animals and Birds Ordinance protects fauna in the Territory and the Heritage Trust Ordinance provides for the protection of sites of natural beauty and scientific interest.

62. According to press reports, in August 1992, the Deputy Chief Minister and Minister for Tourism of the Territory, Mr. Joe Pilcher, assumed responsibility for all matters pertaining to the environment. 21/ Previously, the Environmental Health Department came under the responsibility of the Minister for Medical Services and Sport.

63. During 1991, environmental health work included inspection of dwellings, catering establishments, bakeries, grocery shops, hairdressers' and barber shops, underground water tanks, as well as food inspection, disinfection, mosquito and rodent control, impounding of stray dogs and cats, and the monitoring of noise complaints, atmospheric pollution and the quality of coastal waters.

E. Housing

64. During 1989 and 1990, an extensive sea reclamation scheme carried out in the harbour waters increased the land area of the Territory by 5 per cent over the previous area of 584 hectares. The reclaimed land has increased the total flat land of Gibraltar by 10 per cent.

65. Overcrowding is considered a major social problem in the Territory. According to the 1991 population census, Gibraltar had an average population density of 45.8 persons per hectare, excluding servicemen, visitors and transients. It has been estimated that 14 per cent of the housing stock is overcrowded. In 1990, there were over 2,000 housing applicants on the waiting list.

66. Since the full opening of the border with Spain in February 1985, construction of private housing has increased significantly. In 1992 and 1993, it is expected that over 3,000 new housing units will be completed.

F. Public health

67. The Government's medical and health services consist of hospital services, medical treatment by specialists outside government hospitals where such treatment is beyond the scope of local resources, child welfare and school health services, domiciliary and out-patient treatment of persons coming under the scope of the District Medical Service, the Domiciliary Medical Service, the Ports and Airport Health Service and the Environmental Health Service and Laboratories.

68. The state of health and nutrition is reported to be good and to comply with the standards expected in developed countries. There have been no outbreaks of epidemic or endemic diseases. The principal causes of death are cardiovascular, cerebrovascular, malignant and respiratory (excluding neoplasms) diseases.

69. The main health facility in the Territory is St. Bernard Hospital. It has a total of 192 beds and provides comprehensive out-patient services and in-patient treatment for serious medical and surgical cases. Patients from neighbouring areas of Spain also use the hospital for treatment and hospitalization. In addition, the hospital has a maternity section and two wards for elderly patients. Psychiatric treatment is provided by the King George V Psychiatric Unit which has accommodation for 60 patients. A health centre provides general-practice surgery as well as child welfare and school medical services. Certain medical specialities, which are not provided by the Gibraltar public health facilities, are covered by a programme of visits by consultants from the United Kingdom.

70. In 1991, there were no maternal deaths in the Territory and only two infant deaths. Protection and care of expectant mothers and children includes pre- and post-natal care available at clinics operated by the Gibraltar Health Authority.

71. Expenditure on public health during the period from 1 April 1990 to 31 March 1991 amounted to approximately £13 million.

G. Education

72. Education is free for all children up to "A" level standard and is compulsory for those between 5 and 15 years of age. At the end of 1991, 2,930 pupils were enrolled in the 12 government primary schools, 231 in the one private primary school and 436 in the two services primary schools, making a total of 3,597 students. A further 1,913 students were enrolled in the two government secondary schools. The language of instruction is English while Spanish is taught as a secondary language, particularly in the secondary schools. In 1991, there was a total of 322 teachers for all schools in the Territory.

73. Technical and vocational training is provided at the two government comprehensive secondary schools and at the Gibraltar College of Further Education. This college comprises two separate departments (technology, and business and commercial studies) which conduct a variety of courses leading to national diploma certificates.

74. The Government of Gibraltar and a number of private institutions provide scholarships to young persons who have the ability and the necessary qualifications to pursue a college level education. Most of these students travel to the United Kingdom to complete their university degrees.

75. Expenditure on education for fiscal year 1990/91 amounted to £8.9 million which represents 8.7 per cent of the total recurrent expenditure.

Notes

1/ The information contained in the present paper has been derived from published reports and from information transmitted to the Secretary-General by the Government of the United Kingdom of Great Britain and Northern Ireland under Article 73 e of the Charter of the United Nations on 12 April 1993 for the year 1991.

2/ For details, see Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 23 (A/7623/Rev.1), vol. III, chap. XI, annex, paras. 7-23.

3/ Gibraltar Chronicle, 22 March 1993.

4/ Ibid., 24 March 1993.

5/ Gibraltar Chronicle, 17 January 1992; Le Monde (Paris), 19-20 January 1992.

6/ Gibraltar Chronicle, 17 January 1992.

7/ Ibid., 5 January 1993.

8/ Ibid., 30 October 1992.

9/ Ibid., 19 February 1993.

10/ Ibid., 9 January 1993.

11/ Gibraltar Chronicle, 6 November 1992; 12 December 1992; 4 September 1992; 1 March 1993; 14 September 1992; 16 September 1992; 5 February 1993.

12/ Gibraltar Chronicle, 20 January 1993.

13/ Official Journal of the European Communities, No. C.157/5, 9.6.93.

14/ Gibraltar Chronicle, 26 November 1992.

15/ ABC (Madrid), 23 September 1992; see also Ya (Madrid), 23 September 1992.

16/ Gibraltar Chronicle, 14 December 1992.

17/ Business Life (London), June 1993, p. 55.

18/ Gibraltar Chronicle, 22 April 1993; see also ABC (Madrid), 20 May 1993.

19/ Gibraltar Chronicle, 3 October 1992, 6 February 1993 and 17 March 1993.

20/ Gibraltar Chronicle, 12 January 1993; see also El País (Madrid), 23 May 1993.

21/ Gibraltar Chronicle, 25 August 1992.

Annex I

Translated from Spanish

1 March 1993

Joint press conference with the Foreign Secretary, Mr. Douglas Hurd, in Madrid

Javier Solana:

This is not our first meeting; over the past few months we have met on various occasions, but this is certainly the first time that we have met to consider issues related to Gibraltar. Mr. Douglas Hurd's visit has been short, but very busy. This morning we had the opportunity to have an audience with His Majesty the King. We also met with the President of the Government, and he and I have had two private meetings as well as another, more formal, meeting with all our colleagues. I should tell you that this encounter is one between Mr. Douglas Hurd and myself in which we are welcoming the resumption of meetings in the framework of the Declaration of Brussels after an interval of two years during which, as you know, we did not meet.

I can tell you that we had a very useful meeting and equally useful discussions on the various issues covered by the Brussels agreement, its possible developments and future prospects. We also identified certain areas in which our colleagues will be able to continue working during the coming weeks, and we considered the possibility of arranging for the two of us, Mr. Hurd and myself, to meet again before the end of the year. For these reasons, I believe that it has been a useful visit and, having said that, I give the floor to Mr. Hurd so that he can make his opening statement. Thank you.

Douglas Hurd:

Thank you very much. I would like to express my appreciation to Mr. Javier Solana and his colleagues for the efficiency and courtesy they displayed in organizing this meeting. I am also very grateful to His Majesty the King and to Mr. Felipe González for receiving me this morning and allowing me to talk with them. Our talks were quite cordial. As Mr. Solana has said, we were very pleased to be able to continue these talks on issues including the Brussels Declaration after a two-year period during which we had no meetings on these issues.

We had very useful talks and identified certain areas for further work. As you said, we identified areas in which our officials should continue working, and we also broached the possibility of another meeting of Foreign Ministers later in the year. We explored these possibilities, within the context of problems which limit them, since the topic is a difficult one, but we did identify possible areas for further progress.

Cadena SER:

I should like to ask the Spanish Minister for Foreign Affairs whether he heard anything other than platitudes from Mr. Hurd about the possibility of breaking the deadlock in discussions on the future of Gibraltar. And I should like to ask Mr. Hurd how much longer it is going to be before the United Kingdom complies with the agreement on joint use of Gibraltar airport.

Javier Solana:

Let me reply to the first question, a very precise question to which I shall try and answer in a similarly precise manner, with a single syllable: yes.

Douglas Hurd:

With regard to the issue of the airport, in answer to your question, this is in fact one of the issues which we have earmarked for further consideration. There are genuine differences of opinion regarding the manner in which the agreement on the use of the airport should be implemented, and there are European Community decisions which have altered the situation. So, yes, this is one of the issues which we discussed and, without going into detail, we decided that it is one of the things on which work should continue.

Alberto Miguez, La Vanguardia, Barcelona:

I have two questions for Mr. Hurd. First, do you think that the negotiating framework that was devised in Brussels several years ago is still valid, after some of the rather futile exercises that have taken place? Second question: do you think that the current Constitution of Gibraltar is compatible with the introduction of the airport agreement? Thank you.

Douglas Hurd:

With regard to your first point, if I did not believe in the usefulness of the Brussels process, I would not be in Madrid today. It was our belief that the process could of course be implemented. Now, with regard to the second question, the airport agreement, I would say the same thing to you that I said to the gentleman who asked me the previous question: it does indeed have its difficulties, there are matters which need to be talked about, discussed, and it is in fact one of the very points on which we have insisted that further talks be held and a way to move ahead found.

Magarita Sáens Diez, El Periódico, Barcelona:

Mr. Hurd, I would like to ask you three questions. First, has any specific proposal concerning sovereignty been considered? Second, have there been indications that, among the models under consideration, one possibility is a situation similar to that of Andorra; could you confirm whether this is the case? And, third, when Mr. Hurd was in Madrid three years ago, he stated very specifically that Her Majesty's Government would make every possible effort to shut down the centre for laundering drug-traffic money, and I for one do not

know whether any of these measures have in fact been taken, or whether they have had any effect.

Douglas Hurd:

No. I did not make any proposals regarding sovereignty, following the Andorra model or any other. As for the money laundering, I am convinced that the utmost cooperation is needed between the authorities of Spain and Gibraltar. I know that there is new Spanish legislation which deals with this, very strict legislation, and I should tell you that I am convinced that maximum cooperation between the Spanish and Gibraltar authorities is needed to put an end to this problem.

The Guardian: (question unintelligible)

Douglas Hurd:

The question was that, since Mr. Solana said that possible paths for the future had been contemplated, and, if there is no proposal regarding sovereignty, not even following the Andorra model, and talks on the airport were mentioned, then what path would be followed, what was the path forward that was under consideration this morning. The answer is that ways of proceeding have been discussed. Mr. Solana also mentioned that we were discussing ways of moving forward.

Frankfurter Allgemeine Zeitung:

Mr. Solana, you said yes to the first question. Could you describe and summarize the new developments in the English proposals on Gibraltar, as you see them, from the Spanish perspective?

Javier Solana:

Yes, I would be happy to reply. Today's meeting was in our view a significant one because, as we said at the beginning of our statement, Douglas Hurd and I had not seen each other for approximately two years. So resuming the dialogue that was begun in Brussels is good news for both sides. In our meeting, which, as you have seen, was not very long, lasting just one morning, we considered ways to continue moving forward. I want to repeat that, in Mr. Hurd's and my own initial statements we both said that our colleagues were going to go on working in the coming weeks, and, if these talks prove fruitful, we would like to meet again, at the ministerial level, within the year.

I think that from this perspective, today's visit was quite successful. It is true that many problems have yet to be resolved, it would be foolish to deny it, and it is true that Spain continues to believe that the Gibraltar situation is an anachronism in the case of a country that is an ally. But it is no less certain that today's visit is a step forward, perhaps a small one, but in our view a step in the right direction.

Gibraltar Chronicle:

I would like to ask both Ministers whether Mr. Bossano's hope for self-determination and constitutional change has been touched on or mentioned and whether, if no progress occurs, the Spanish Government intends to create further difficulties, to close the border.

Douglas Hurd:

In answer to the first question, I would say that one of the parameters, one of the key issues from the British point of view, is our obligation to respect the wishes of the people of Gibraltar. This is part of the 1969 Constitution, and it is also included in the Brussels agreement, if not as a specific point in the declaration, then as a notion implicit to the British position vis-à-vis the people of Gibraltar.

Javier Solana:

I shall try to answer your question. You know very well that the subject of self-determination, of the sovereignty of Gibraltar, falls outside the sphere of what Spain is willing to consider. Right now the citizens of Gibraltar are British citizens and in the future they can only be Spaniards. So the process of self-determination, from the Spanish perspective is beside the point. Second question, regarding what would happen if no progress was made. Spain, as you know - and if you don't, I am telling you so right now - will attempt to combine persuasion and pressure as appropriate. To what end? So that the citizens of Gibraltar can understand, and acknowledge, that it is much more beneficial for them to normalize their relations with Spain. This is what the Spanish Government is doing, and will certainly go on attempting to do, emphasizing either persuasion or pressure, depending on how the process progresses.

Juan Roldán, COPE radio network:

I wanted to ask Mr. Solana if a tripartite meeting involving Britain, Spain, and Gibraltar was one of the ways of proceeding that were mentioned in your talks. Secondly, might one of the methods of pressure that you mentioned be the construction of a second airport in the Campo de Gibraltar area?

Javier Solana:

I shall answer you very briefly. With respect to the first question, we understand that relations between Spain and Great Britain must be bilateral. On our part, we have no problem with incorporating representatives of Gibraltar in the British delegation - in fact, we desire it. It is not our wish that the Gibraltar representatives be not included in these talks, it is the wish of their leaders. With respect to the second question, in principle, we would much rather find a solution to the airport problem before setting out to build an airport a few kilometres from a European airport that could be perfectly usable by Spain if the situation opened up and if some of the problems facing the citizens of Gibraltar and also Spanish citizens who would benefit from the airport, either now or later, could be resolved. In principle, then, we would like to resolve the airport dispute in accordance with the basic principles we agreed to in 1987. And secondly, if that is not possible, we will, naturally,

study other solutions, but in principle we would prefer not to have to consider them.

Ignacio Cembrero, El País:

My first question is to both Ministers. I would like to ask you if, among the procedures proposed for continuing the dialogue, are you prepared to consider, or do you favour a review of the 1969 Constitution of Gibraltar and, more specifically, I would like to ask Mr. Solana what role Spain hopes to play in such a possible revision or redrafting of Gibraltar's Constitution.

Douglas Hurd:

It is a fact that the Chief Minister of Gibraltar has requested a revision of the Constitution, that is a fact. But we have not gone any farther on this subject, we have not spoken of the essence of the Constitution of Gibraltar. We have simply been studying the possibilities for continuing the debate within the established framework of negotiations. This is what we have referred to this morning.

Javier Solana:

I have nothing to add.

Victoria Garcia, Antena-3 Radio:

I would like to ask you two questions. The first is for Mr. Hurd. Spain is holding up the agreement on the external borders of the Community in the Schengen Group because of the question of Gibraltar. Is your Government going to do anything about this? I refer to offering something to Spain in exchange for moving ahead on the Schengen matter. The other question is also for you. If it appears that all the problems are due to the fact that the citizens of Gibraltar do not accept, or at least have cast a veto on the issue of the airport, if the problem lies with the people of Gibraltar, why don't you give them a seat on your delegation so that they can participate and express their opinions in the bilateral talks?

Douglas Hurd:

As for the first part of your question, it is true that the External Frontiers Convention is held up despite many efforts to resolve the situation. For example, the President of Portugal has made an effort to do so. We have not discussed it today because it seems to me that the positions are well known. As for the second part of your question, the Brussels process does indeed include the possibility of Gibraltar's representation. The authority of the Chief Minister of Gibraltar is quite relevant. In these matters we must find practical ways of ensuring Gibraltar's representation in this process.

Roberto Cobo, La Tribuna (daily), Argentina

Two questions for Mr. Hurd. Does the Government of Great Britain compare the negotiations on Gibraltar with the question of the Malvinas? Second, taking this opportunity, Mr. Minister, I would like to know what stage the talks with

the Argentine Government have reached on President Menem's visit to Great Britain. Thank you very much.

Douglas Hurd:

The two issues have very different historical backgrounds, ages and precedents, so there is no comparison. As for the second question, I am very pleased with the talks I held with President Menem and Minister Guido Di Tella during my recent visit to Argentina. As for President Menem's visit to the United Kingdom, I can add nothing to what Mr. Guido Di Tella said.

Hooper, The Guardian:

My question is whether you were only discussing procedures, or if you talked about preparing the way for the future, whether you only discussed procedures and did not present any new plans. And my other question was, why was direct participation by representatives of Gibraltar in these talks not permitted?

Douglas Hurd:

To answer your second question first, we have long believed that Gibraltar should participate. I have clearly expressed the British position as far as respecting the wishes of the people of Gibraltar. As for the first question, I said that we did discuss procedures for determining possible ways of continuing these discussions in order to start resolving political issues and also practical issues, such as the airport. We did, indeed, discuss procedures.

Thank you very much.

Annex II

Action brought on 19 April 1993 by the Government of Gibraltar and the Gibraltar Development Corporation against the Council of the European Communities

(Case C-168/93)

(93/C 157/08)

An action against the Council of the European Communities was brought before the Court of Justice of the European Communities on 19 April 1993 by the Government of Gibraltar and the Gibraltar Development Corporation represented by Ian S. Forrester, Queen's Counsel at the Scots Bar, Richard O. Plender, Queen's Counsel at the Bar of England and Wales and Alasdair R. M. Bell, Solicitor, Scotland, acting on the instructions to Messrs Forrester Norall & Sutton, with an address for service in Luxembourg at the Chambers of Maître Marc Loesch, 8, rue Zithe.

The applicants claim that the Court should:

1. annul Article 1 (3) of Regulation (EEC) No 95/93 (1) at least in so far as it applies to the applicants;

2. take such further or different steps as justice may require;

3. order the Council to pay the costs of the applicants.

Pleas in law and main arguments adduced in support:

Article 1 (3) of Council Regulation 95/93 of 18 January 1993, on common rules for the allocation of slots at Community airports, provides for the suspension of the application of the provisions of that Regulation to Gibraltar airport until the arrangements in the joint declaration by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation.

The Government of Gibraltar asserts that Article 1 (3) of Regulation 95/93 is of direct and individual concern to it, as the entity responsible for the welfare of Gibraltar's economy, as well as in pecuniary and other respects.

The Gibraltar Development Corporation asserts that Article 1 (3) is also of direct and individual concern to it. Were it not for the suspension of the application of Regulation 95/93 to Gibraltar airport, the number of flights serving Gibraltar would increase. The Gibraltar Development Corporation, as the entity responsible for managing the operation of the airport, would derive additional income therefrom.

The applicants contend that the said Article 1 (3) is illegal (i) because of the infringement of an essential procedural requirement:

(a) failure to consult the Economic and Social Committee and the European Parliament in accordance with Article 75 (1) of the EEC Treaty, exacerbated by failure to comply with the Parliament's request to be informed and consulted if the Commission's proposal was modified after the Parliament had rendered its opinion;

(b) failure to state reasons as required by Article 190 of the EEC Treaty;

and (ii) because of infringement of the rules of law relating to the application of the EEC Treaty. The applicants contend

that Article 1 (3) is substantively illegal for the following reasons:

(a) it violates the principle that Community law prevails over inconsistent national legal norms. Bilateral agreements between Member States should not, in principle, abridge the universal application of Community law throughout the Community;

(b) there is no factual or legal justification for the terms of Article 1 (3); the mere existence of a bilateral agreement between two Member States is no justification for suspending the application of Community law in a particular area;

(c) it violates the principle of legitimate expectations; other Community instruments regulating the issue of slot allocation apply to Gibraltar airport, the exclusion of Gibraltar airport from Regulation (EEC) No 95/93 is legally and logically inconsistent;

(d) it violates the principle of non-discrimination; it selects Gibraltar airport, out of all airports in the Community, to receive distinctive and inferior treatment, in being subject to suspension of the benefits of the regime established by Regulation (EEC) No 95/93;

(e) it violates the principle of proportionality; other, less burdensome, means were available to take account of the preoccupations of the Member States concerned;

(f) it violates the EEC Treaty, in particular Articles 2 and 3 thereof, as well as Article 74; instead of promoting the harmonious development of economic activities, balanced expansion and closer relations between Member States, it frustrates the achievement of these aims; it perpetuates competitive distortions instead of removing them; and it is inconsistent with the common transport policy contemplated by Article 74.

(1) OJ No L 14, 22. 1. 1993, p. 1.

/...

The said violations of Community law have damaged the applicants in pecuniary and other respects. If Community law were applied without discrimination in Gibraltar, the applicants would be directly and individually benefited by the resulting development of air services to and from Gibraltar airport.

Annex III

TRIBUNAL DE JUSTICIA
DE LAS
COMUNIDADES EUROPEAS

DE EUROPÆISKE FÆLLESSKABERS
DOMSTOL

GERICHTSHOF
DER
EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ
ΤΩΝ
ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE
OF THE
EUROPEAN COMMUNITIES

LUXEMBOURG

COUR DE JUSTICE
DES
COMMUNAUTÉS EUROPÉENNES

CÚIRT
BHREITHIÚNAIS NA
gCOMHPHOBAL EORPACH

CORTE DI GIUSTIZIA
DELLE
COMUNITÀ EUROPEE

HOF VAN JUSTITIE
VAN DE
EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA
DAS
COMUNIDADES EUROPEIAS

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 4 May 1993 *

In Case C-298/89

Government of Gibraltar
v
Council of the European Communities

* Original language: German.

/...

Contents

Paragraph No

A Introduction 1

B Analysis 21

I. The "capacity" of the applicant to bring the action 23

1. The applicant's capacity as a legal person 23
(a) The status of Gibraltar 25
(b) The objections of Spain and the Council 32
(c) The objections of the United Kingdom 34

2. The question whether the action has been brought by the competent organ of the applicant 48

II The applicant's complaint 51

III The question whether the contested measure is of direct concern to the applicant 66

IV The objection based on the "nature of the act appealed against" 81

1. The significance of the fact that the contested provision forms part of a directive 83

2. The question whether the contested provision is in the nature of a decision 97

V The question whether the contested provision is of individual concern to the applicant 98

1. The meaning of that characteristic and the interests asserted 98

2. The question whether the contested provision is of individual concern to the applicant in the light of the interests asserted 101

(a) The applicant's ownership of the terminal 101
(b) The applicant's capacity as an authority entitled to levy charges 122
(c) The applicant's position as an authority responsible for looking after the well-being of the inhabitants of Gibraltar 127

C Conclusion 136

Mr President,
Members of the Court,

A Introduction

1. This Opinion concerns the admissibility of a direct action in which the Government of Gibraltar is contesting a provision of Council Directive 89/463/EEC amending Council Directive 83/416/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States[1].

2. Directive 83/416[2], which Directive 89/463 amended, constituted an initial step towards the liberalization of the conditions governing access to the market for sceduled air services. According to the principle laid down in Articles 3 and 6 of Directive 83/416, authorization to operate an inter-regional air service already approved by the Home State of the air carrier concerned could be refused by the other State affected only under certain exhaustively listed conditions.

3. However, the scope of those rules was subject to strict limitations, relating to three aspects in particular. First, they applied as a general rule only to flights operated over stages of 400 kilometres or more (Article 1(a)). Secondly, they were restricted to services by aircraft having a capacity of not more than 70 passenger seats or a maximum takeoff weight of not more than 30 tonnes (Article 1(b)). Lastly, they were subject to the condition that there should exist no indirect service[3], nor any connection via neighbouring airports (Article 3(2), second subparagraph); and even where the last-mentioned condition was fulfilled, the other Member State concerned could refuse, as the Home State, to grant the authorization where the air traffic connection in question was already satisfactorily catered for, in qualitative and quantitative terms, by existing direct air services between the two airports concerned (Article 6(1)(c)).

4. That position remained the same following the first amendment of the directive by Directive 86/216/EEC[4], which merely took into account the consequences of the accession of Portugal, by means in particular of the classification of Portuguese airports.

1 — OJ 1989 L 226, p. 14.

2 — Council Directive of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (OJ 1983 L 237, p. 19).

3 — This term means, as is clearly indicated by the text of the provision, connections which involve changing aircraft.

4 — Council Directive amending, on account of the accession of Portugal, Directive 83/416/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (OJ 1986 L 152, p. 47).

5. However, all three of the aforementioned limitations were lifted by the directive in question here once experience had shown that only a few air services had been authorized in accordance with the directive as it originally stood[5]. Furthermore, the rules regarding the sharing of capacity pursuant to Articles 3 and 4 of Decision 87/602[6], which had meanwhile been laid down in the course of the application of the so-called first package of measures aimed at the liberalization of air traffic[7], were extended to cover air services falling within the ambit of Directive 83/416.

6. However, Article 2 of the contested directive, Directive 89/463 as outlined above, contains special provisions in respect of Gibraltar airport. Those provisions take into account a difference of opinion between the Kingdom of Spain and the United Kingdom, relating to the question of sovereignty over the territory in which the airport is situated.

7. Paragraph 1 of that provision contains the following general saving clause, to which the application of the directive is subject in so far as concerns that problem:

'The application of this Directive to the airport of Gibraltar shall be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.'

8. Paragraph 2 specifies the *date from which the directive is to apply* to Gibraltar airport, as follows:

'Application of the provisions of this Directive to Gibraltar airport shall be suspended until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of the Kingdom of Spain and the United Kingdom will so inform the Council on that date.'

9. It is that paragraph which forms the subject-matter of the present action.

5 – See the fourth recital in the preamble to Directive 89/463.

6 – Council Decision of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States (OJ 1987 L 374, p. 19).

7 – See also the remainder of the texts published in Official Journal L 374 of 31 December 1987, together with the judgment of the Court of Justice in Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR 803.

10. The Joint Declaration[8] mentioned therein refers to the negotiations being held to resolve the differences of opinion regarding Gibraltar[9] and to the forthcoming promulgation of the rules contained in the first package of measures[10] (which had been delayed because of those differences of opinion[11]). The steps considered by the parties to be appropriate in those circumstances included the erection by the Spanish authorities of a check-in building (terminal) on the northern side of the existing frontier fence. Passengers travelling from and to places located to the north of the fence were to have direct access to that new terminal. The existing terminal, which, like all the other airport facilities, is situated on the territory to which the difference of opinion relates, was to be used by the other passengers. Pursuant to Paragraph 3.3 of the Declaration, where appropriate, passengers were to be subject to customs and immigration controls in the respective terminals.

11. The application of the matters agreed in the Joint Declaration, upon which the application of Directive 89/463 to Gibraltar airport is rendered contingent by the contested provision, is governed by Paragraph 8 of the Declaration. That paragraph refers to Paragraph 3.3 and provides as follows:

'The above arrangements will come into operation when the British authorities have notified the Spanish authorities that the legislation necessary to give effect to paragraph 3.3 above is in force, or on completion of the construction of the Spanish terminal, whichever is the later, but in any event not more than one year after the notification referred to above.'

12. It is established that those preconditions for the application of the Joint Declaration have not yet been fulfilled.

13. As is apparent from the above outline of the relevant circumstances, the legal position in respect of scheduled regional air services from and to Gibraltar results, in view of the provision at issue in this case, from Directive 83/416, as amended by Directive 86/216.

14. That position has not been altered by legal developments in the course of these proceedings. It is true that those developments include the revocation of

8 -- Annex 3 to the application.

9 -- Second paragraph of the preamble.

10 -- Third paragraph of the preamble.

11 -- See EC Bulletin 6-1987, points 2.1.221 and 2.1.227, and also EC Bulletin 12-1987, points 2.1.272 and 2.1.280.

Directive 83/416 by Regulation No 2343/90[12], which has in turn been revoked by Regulation No 2408/92[13]. However, Regulation No 2343/90 contains in Article 1(3) a provision which is substantively the same as the provision at issue in this case. Inasmuch as 'application of the provisions of this Regulation' to Gibraltar airport is thereby to be 'suspended' until the Joint Declaration comes into operation, that also applies to the revocation of Directive 83/416 pursuant to Article 16 of the Regulation. That revocation must therefore be regarded as suspended on the same conditions as the other provisions of the regulation. Regulation No 2343/90 thus in effect contained, as regards the rules applying to scheduled flights to and from Gibraltar, a reference to Directive 83/416. That reference is in turn taken up by Regulation No 2408/92, Articles 1(3) and 15 of which correspond to Articles 1(3) and 16 of Regulation No 2343/90. There is thus a chain of reference leading back to Directive 83/416.

15. Mention should also be made of the fact that Article 1(6) of Decision 87/602, which is referred to above and which forms part of the first package of measures, contains a provision similar to that contested in this case. However, Article 1(6) has not been called into question by the applicant or anyone else. On the other hand, Article 1(3) of Regulation No 2343/90 and Article 1(3) of Regulation No 2408/92 have been contested, the former by the Gibraltar Development Corporation[14], which has apparently taken over ownership of the existing terminal from the applicant in the present proceedings on 28 June 1990, and the latter by that Corporation jointly with the Government of Gibraltar[15]. Furthermore, both of those parties have contested Article 1(3) of Regulation No 294/91[16], relating exclusively to the carriage of cargo[17]. That regulation also contained a provision similar to the one at issue in this case[18].

12 – Council Regulation on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States (OJ 1990 L 217, p. 8).

13 – Council Regulation of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8).

14 – Case C-336/90.

15 – Case C-397/92.

16 – Council Regulation of 4 February 1991 on the operation of air cargo services between Member States (OJ 1991 L 36, p. 1); this regulation has likewise been revoked by Regulation No 2408/92.

17 – Case C-128/91.

18 – The last of the series of cases currently pending is the very recent application by the Government of Gibraltar and the Gibraltar Development Corporation in Case C-168/91. It relates to Article 1(3) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1).

/...

16. In this case the Government of Gibraltar claims that the Court should:

- annul Article 2(2) of Directive 89/463 at least in so far as it applies to the applicant;

- take such further or different steps as justice may require;

- order the Council to pay the costs of the proceedings.

17. The Council has raised (as in the other three actions) an objection of inadmissibility contending that the Court should:

- dismiss the claim as inadmissible;

- order the applicant to pay the costs of the proceedings.

18. The Kingdom of Spain, the United Kingdom and the Commission support that objection.

19. The Government of Gibraltar claims for its part that the Court should reject that objection and order the Council and the interveners to pay the costs occasioned thereby, or alternatively that it should reserve its decision until final judgment is given.

20. By order of the Court, separate oral argument has been presented regarding the objection of inadmissibility. My Opinion is thus confined to the question of admissibility.

B Analysis

21. In its objection, the Council contests the admissibility of the application in four respects:

- the applicant is not 'qualified' to bring the action;

- the nature of the contested provision is such that the application is inadmissible;

- that provision is not of direct concern to the applicant;

- it is not of individual concern to the applicant.

22. All of those objections are rightly based on the fact that the admissibility of the application turns on the second paragraph of Article 173 of the Treaty and not the first paragraph of that provision. The applicant itself has based its action on the second paragraph of Article 173. Furthermore, all the parties are agreed that

the applicant does not constitute a Member State within the meaning of the first paragraph of that provision[19].

23. I.1. The first objection raised on that basis, relating to the applicant's lack of 'capacity', concerns first and foremost the requirement laid down by the second paragraph of Article 173 that an applicant must be a natural or legal person.

24. The Council and Spain on the one hand and the United Kingdom on the other dispute the applicant's capacity as a legal person from different standpoints.

25. (a) For a proper understanding of that assertion, it is necessary to bear in mind various undisputed facts regarding the status of Gibraltar and the rules laid down by the United Kingdom in respect of that territory.

26. Gibraltar is one of 'Her Majesty's dominions'. According to a definition given by one learned writer[20], these are dependent or independent territories under the sovereignty of the Crown. In Community law, the effect of this is that Gibraltar is regarded as a European territory, within the meaning of Article 227(4) of the Treaty, for whose external relations a Member State (in this case, the United Kingdom) is responsible[21].

27. However, as previously stated, the extent of that territory is a matter of dispute between Spain and the United Kingdom as regards the part of Gibraltar in which the airport is situated[22].

28. By an Order in Council, the Gibraltar Constitution Order 1969, Her Majesty laid down certain rules for the exercise of public authority in that dominion which are set out in Annex 1 to that Order (hereinafter referred to as 'the 1969 Constitution'). The chapters of that legislation are entitled: 'Protection of Fundamental Rights and Freedoms of the Individual', 'The Governor and the Deputy Governor', 'The Legislature', 'The Executive', 'The Judicature', 'Finance' and 'The Public Service' (followed by 'Miscellaneous').

29. Those provisions establish inter alia certain organs, the functions of which are described in detail. Those organs include the Governor. Under section 18, he

19 – See also paragraphs 25 et seq., below.

20 – Halsbury's Laws of England, 4th edition, Volume 6, paragraph 803.

21 – In this respect there is concordance between the views of Spain (see the second paragraph of point 2.4 of its intervention) and those of the United Kingdom (see p. 22 of the transcript of the hearing).

22 – Where reference is hereinafter made to the rights and interests invoked by the applicant, it is done on the basis of the applicant's allegations. It is not intended - nor is it necessary - in the context of this Opinion to adopt a position on the difference in the views of the two Member States concerned.

acts as the representative of Her Majesty. Section 45(1), in the chapter regarding the executive, provides that 'the executive authority of the Government of Gibraltar shall vest in the Governor on behalf of Her Majesty'. The executive also includes the Council of Ministers, consisting of a Chief Minister and other Ministers (numbering not less than four nor more than eight). By section 48(1) of the 1969 Constitution the Governor may charge any member of the Council of Ministers with responsibility for any business of the Government of Gibraltar (including the administration of any department of government) relating to any defined domestic matter. Section 50(1) provides, subject to the provisions of that section, that the Governor is to consult with, and act in accordance with the advice of, the Council of Ministers in the formulation of policy relating to any defined domestic matter and in the exercise of any power conferred upon him by the 1969 Constitution or any other law, to the extent that that power relates to a defined domestic matter.

30. Under section 55, 'defined domestic matters' means such matters as may be specified by the Governor, acting in accordance with instructions given by Her Majesty through a Secretary of State. However, there was appended to the 1969 Constitution a Despatch issued by the Foreign and Commonwealth Office, containing a list of 'defined domestic matters' which the parties regard as binding. That list is preceded by explanatory notes providing that responsibility for all matters which are not 'defined domestic matters', for example external affairs, is to devolve directly upon the Governor.

31. Furthermore, the 1969 Constitution uses the term 'Government (of Gibraltar)', for example in the aforementioned sections 45 and 48, without however expressly defining the meaning of that term.

32. (b) The Council[23] and Spain[24] doubt that the applicant has legal personality, because according to them the applicant wrongly equates the 'Government of Gibraltar' with the Council of Ministers. Spain asserts in particular that if the application is being made only upon instructions from the Chief Minister, it cannot be maintained that it has been made by the Government of Gibraltar; it can only have been made by the Council of Ministers. All of the applicant's assertions regarding its legal personality are thus irrelevant.

33. In my view, those objections relating to the identity of the applicant should not be upheld. Upon first lodging its application[25], but also, in particular, in its subsequent reply to a question expressly put by the Court[26], the applicant has made

23 -- See pages 6 to 8 and 11 of its pleading.

24 -- See page 36 of its pleading.

25 -- See page 25, paragraphs IV.4 and 5.

26 -- See page 6 of the joint opinion of Sir William Wade and Eli Lauterpacht, forming part of the answers to the questions put by the Court.

it clear that it construes the term 'Government of Gibraltar' to mean all of the organs specified in the 1969 Constitution (although other statements made in that regard by the applicant are more equivocal[27]). We must accept that designation given by the applicant (see Article 38(1)(a) of the Rules of Procedure).

34. (c) Unlike the Council and Spain, the United Kingdom's doubts regarding the legal personality of the applicant are based on an appraisal of the body described in the 1969 Constitution as the 'Government of Gibraltar'.

35. The applicant regards that body as a legal person within the meaning of the second paragraph of Article 173. The Gibraltar Government, it says, is empowered to raise and retain taxes, to hold and dispose of real and personal property as the owner or lessee thereof, to demise real property, to enter into contracts, to appear before the courts of Gibraltar and of the United Kingdom and to conclude intergovernmental agreements with the Government of the United Kingdom, such as those concluded in relation to the business carried on by shipyards and the pensions of Spanish employees.

36. In its reply to the Council's objection, it states that the correct name of the legal person is 'the Crown in right of Gibraltar'. In its reply to the questions put by the Court it declares that the Government of Gibraltar is in the same position as the government of any other British colony, the distinct legal personality of which as a matter of domestic law has never been doubted. The language in which that personality has been described, namely 'the Crown in right of Gibraltar' or 'the Crown in right of Bermuda' in no way diminishes the separateness of each personality.

37. The United Kingdom's view in that regard is that Article 173 differentiates between actions brought by Member States and Community institutions on the one hand and by natural and legal persons on the other, inasmuch as it is only the latter who have to meet the specific conditions of admissibility contained in the second paragraph. Consequently, it is not possible for the same legal entity simultaneously to be a privileged applicant (as a Member State) and a legal person. A clear distinction must therefore be drawn between legal persons within the meaning of the second paragraph of Article 173 and administrative authorities which constitute the central departments of State or whose activities are so closely linked to those of the central administration that they must be excluded from the scope of the second paragraph of Article 173. The Government of Gibraltar, however, is merely an emanation of the Crown exercising certain executive powers on behalf of the Crown in Gibraltar. The capacity of that Government to own land and to sue and be sued exists only in order to facilitate actions being brought by or against the Crown. The United Kingdom maintains that the Government of Gibraltar is not

27 – See page 3 of Opinion A and paragraphs A and B on page 1 of Opinion B, both of which are annexed to the applicant's reply to the objection of inadmissibility.

thereby given the status of a legal person within the meaning of the second paragraph of Article 173, since it is not thereby distinguished from the central governing authority of the State. The meaning of the term 'legal person' under Community law is not necessarily the same as in the various legal systems of the Member States.

38. It should be observed that in fact that difference of opinion does not relate to the interpretation of the term 'legal person' in the second paragraph of Article 173.

39. The applicant and the United Kingdom are agreed that what is involved is a concept of Community law. Both parties to the action, especially the applicant, further appear to be proceeding on the basis that a body which constitutes merely a non-autonomous part of the administration of another body cannot be regarded as a legal person within the meaning of the second paragraph of Article 173. This is consistent with the case-law of the Court. In the case of *Syndicat Général*[28] the Court held, with regard to the Commission's objection that the applicant trade union lacked capacity to institute proceedings, that:

'Under its rules, its constitutional structure is such as to endow it with *the necessary autonomy* to act as a responsible body in legal matters.'[29]

40. That requirement applies in relation to all bodies, regardless of whether they derive from private or public law. It is most closely linked to the nature of the second paragraph of Article 173 as an instrument for the protection of interests which the applicant may assert on the basis of its *own rights*. Applying that logic, an applicant which is not a natural person can be regarded as a legal person only if it possesses the requisite autonomy to be capable of having its own rights.

41. The answer to the question *whether* an applicant body fulfils those requirements in a particular case depends upon its objective legal status, deriving as a general rule from domestic law (including law imposed by treaty), without the consequences of such status being necessarily the same under Community law and under domestic law. The autonomy of the applicant body may be limited in that regard to individual rights, without its being thereby prevented from qualifying as a legal person within the meaning of the second paragraph of Article 173[30].

42. In the present case it is only the provisions of the 1969 Constitution which might be the source of such autonomous status on the part of the 'Government

28 -- See the judgment in Case 18/74 *Syndicat Général du Personnel* v *Commission* [1974] ECR 933.

29 -- Paragraph 7 of the judgment; emphasis added.

30 -- See the Opinion of Mr Advocate General Mancini in Case 282/85 *DEFI* v *Commission* [1986] ECR 2469, at page 2471, paragraph 2.

of Gibraltar'. In line with those considerations, the dispute between the applicant and the United Kingdom concerns in essence the consequences of those provisions for the purposes of the second paragraph of Article 173 of the Treaty.

43. In those circumstances, the Court, in order to reach its decision on the legal personality of the applicant, must undertake an interpretation of domestic constitutional law. However, this proves to be anything but straightforward:

- the precise relationship between the 'Government of Gibraltar' and the central administration of the Crown is not, so far as we have been informed, defined in any legal text;

- according to the definition[31] given by the applicant, the Government of Gibraltar comprises not only organs representing the interests of the central administration (the Governor) but also organs which embody the interest of the local community in its own autonomy (the Council of Ministers);

- the relative importance of those two components is not readily ascertainable; it might depend on the relevant practice in the event that, at first sight, the same matter is capable of being classified as a defined domestic matter and as a matter reserved to the Governor (for example in the sphere of external affairs)[32]. The United Kingdom correctly refers in that regard to the problem of the overlapping of spheres of competence.

44. It should on the other hand be observed that there can be no question of the applicant manifestly lacking legal personality. The United Kingdom's

31 – See paragraph 33 above.

32 – Paragraph 4 of the Despatch cited above (in paragraph 30) appears to establish in such circumstances a rule favouring the jurisdiction of the Governor:

> 'It is desirable ..., to draw attention to certain general exceptions which must qualify the list of defined domestic matters, in the sense that wider considerations would require responsibility to be retained by the Governor even though the subject matter may at first sight appear to be "domestic". Such exceptions should, in my view, include all matters relating to Her Majesty (for example honours, flags, etc.); the application to Gibraltar of international agreements, the implementation in Gibraltar of international obligations and the participation of Gibraltar in specialised international bodies ...'
>
> ...
>
> However, the current practice appears in general to be oriented towards the preservation of the prerogatives of autonomy vested in the central administration (see the statement made to a UN committee on 6 August 1979 by the British representative, cited on page 9 of the joint opinion [see footnote 26] and in the oral procedure [see page 39 of the transcript of the hearing]; see also the United Kingdom's reply to the question why the Governor took no steps in the present case to oppose the application [see page 60 of the transcript of the hearing]. However, no precise conclusions can be drawn from such general practice - which may moreover change - in relation to the legal status of the 'Government of Gibraltar'.

observations reveal certain inconsistencies in that regard. *In its arguments regarding the legal personality* of the applicant, the United Kingdom presupposes inter alia that an application such as the present one falls, in view of the matters dealt with, *within the competence of the Governor*[33]. That appears to me to be a problem regarding due representation. Does it mean that the legal autonomy of the applicant Government is sufficient for the purposes of the second paragraph of Article 173 and that in reality the only question arising is that of due representation?[34]

45. In its reply to the questions put to it by the Court with regard to the question of ownership of the various airport installations, the United Kingdom also stated that on '26 September 1990 the land on which the terminal stands was transferred to the Gibraltar Government by the Secretary of State for Defence, i.e., from the Crown in right of the Government of the United Kingdom to the Crown in right of the Government of Gibraltar'[35]. I wonder how it is that ownership can be transferred in the manner described where the transferor and the transferee are simply different embodiments of one and the same (legal) person.

46. In the light of such difficulties, I propose that this point be dealt with only in so far as may be absolutely necessary for the purpose of deciding the case. I would also advise against simply resolving the question arising on the basis of the rules on the burden of proof. In direct actions it is without doubt incumbent on the applicant to set forth and prove the facts upon which, in the light of the applicable conditions (in this case, the second paragraph of Article 173), the admissibility of its application depends[36]. However, in my view the Court's jurisdiction to examine of its own motion the admissibility of an action (Article 92(2) of the Rules of Procedure) includes the ancillary power to procure any information which may be necessary for such examination, even where no offer to produce evidence has been made by the party upon whom the burden of proof rests. This might involve in particular the production of (additional) expert opinions from renowned universities.

47. As I shall demonstrate in due course, however, it is not in my view necessary to deal conclusively with the question of the legal personality of the applicant.

33 -- See paragraph 5.5 of its observations on the objection of inadmissibility.

34 -- See also paragraph 7 of its reply to the questions put by the Court.

35 -- See paragraph 38 of its reply to the questions put by the Court.

36 -- See for example the Order of the Court in Case 152/87 *Montgomery* v *Parliament* [1987] ECR 4899, paragraph 9. The burden of proof may be shifted in special cases, particularly in relation to evidence regarding the commencement of the period for bringing proceedings, where this is dependent on some notification by the defendant (see, for example, the judgment in Case 58/88 *Olbrechts* v *Commission* [1989] ECR 2643).

48. 2. I propose that the issue whether this action has been brought by the competent organ of the Government of Gibraltar be treated in the same way. As appears from the application, the action was brought on the instructions of the Chief Minister. According to the applicant, the decision to bring the proceedings was made by the Council of Ministers[37], and the Chief Minister requested the applicant's legal representatives, on the instructions of the Council of Ministers, and in the name of the Government of Gibraltar, to initiate the action[38]. The applicant takes the view in that regard that the Council of Ministers acted as the competent organ for the Government of Gibraltar, since these proceedings concern matters which are specified as defined domestic matters in the Despatch, under the designations 'Civil Air Terminal'[39], 'Tourism', with the subdivision 'Tourist Promotion in Gibraltar', and 'Economic Development (as hitherto)'[40]. The fact that the present dispute is in some measure also concerned with the external affairs of Gibraltar (the implementation of an agreement with Spain) is irrelevant, according to the applicant, since it is possible to establish a connection between almost any defined domestic matter and external affairs. At all events, the Governor, despite having been informed of the proposal to initiate the action, took no steps to oppose it or to state, pursuant to section 55 of the 1969 Constitution, that the subject-matter of the action was not a defined domestic matter.

49. On the other hand, the Council - which also pleads in that regard a lack of 'capacity' on the part of the applicant - and the United Kingdom dispute the competence of the Council of Ministers as an organ of the Government of Gibraltar. Of the various organs of the Government, the matter falls, in their view, within the competence of the Governor, who is responsible for external affairs. The present action relates to the activities of the Community, the implementation of the EEC Treaty in Gibraltar, international air transport and relations between the United Kingdom and Spain, even though the matter in question may appear at first sight to be 'domestic'. The United Kingdom further refers to the fact that the Governor did not authorize the initiation of the action.

50. In the course of the oral procedure, the United Kingdom conceded, however, that it is relying on the connection of this dispute with external affairs only in so far as the Government of Gibraltar's action is based upon its governmental interests, but not, on the other hand, in so far as the applicant is relying on its interests as owner of the terminal. This appears to me yet another reason for not going any further into the question of due representation.

37 – See pages 6 and 7 of the Joint Opinion (see footnote 26).

38 – See paragraph II.8 on page 21 of the applicant's reply to the objection of inadmissibility.

39 – Under the heading 'Public Services'.

40 – Under the heading 'Revenue-Contributing Services'.

51. II. If we thus assume for the sake of argument that the applicant possesses the capacity of a legal person and that the Council of Ministers (represented by the Chief Minister), in acting on behalf of the Government of Gibraltar, did so in accordance with the 1969 Constitution, there remain to be considered the other objections regarding admissibility raised by the Council and by the interveners.

52. Those objections are primarily based upon the contention that the contested measure is not of direct and individual concern to the applicant. That assertion necessitates a number of observations as to the nature of the interests upon which the applicant bases its case, thereby enabling the nature and scope of the applicant's complaint to be determined.

53. The interests asserted fall into two groups: first, the applicant's interest in the commercial exploitation of its ownership of the existing terminal at the time when the action was initiated; and secondly, its interests as the holder of sovereign powers, in its capacity as an authority concerned with the procedure for the approval of inter-regional air services, as the authority responsible for the well-being of the inhabitants of Gibraltar, and as the authority levying fees and taxes in connection with air transport and related matters[41].

54. The applicant's submissions regarding its interests as the holder of sovereign rights are not irrelevant to its complaint solely because it classifies its interests as sovereign. The possibility cannot be excluded in principle that bodies vested with sovereign powers within the Community which are not Member States should enjoy, as regards their interests, including those of a public-law nature, the legal protection afforded by the second paragraph of Article 173[42]. However, they must be able to demonstrate that the contested measure is of direct and individual concern to them[43].

55. As far as the applicant's ground of complaint is concerned, reference must be made to a factor forming the common denominator of the interests asserted. The applicant's view is that it would profit in all those respects from the increase in air traffic which would result from the application of Directive 89/634 to Gibraltar airport. The most attractive routes could be operated economically only with aircraft having more than seventy passenger seats. The Council and the interveners do not appear to wish to contest the fact that the application of

41 -- See in particular pages 31 to 33 of the application. It is curious that the applicant does not seek to establish any link between the interests specified, relating to its position under public law, and the 'defined' domestic matters' alleged in the application to have been affected.

42 -- See my Opinion in Joined Cases 62/87 and 72/87 *Exécutif régional wallon* v *Commission* [1988] ECR 1573 (paragraph 13 on p. 1582).

43 -- See the last footnote, and also the judgment in Case 222/83 *Municipality of Differdange* v *Commission* [1984] ECR 2889.

Directive 89/463 to Gibraltar airport would give a genuine chance of an increase in the volume of traffic to and from that airport. The Commission has merely stated (without putting forward any substantiated counter-arguments) that the applicant has failed to prove its assertions in that respect. That argument is rendered all the less apposite by the fact that the Joint Declaration of 2 December 1987 and the provision at issue themselves show that Spain and the United Kingdom were expecting an increase in air traffic.

56. On the other hand, it is undeniable that the contested provision will not result in a deterioration in the applicant's position as regards any of the interests alleged. On the contrary, its complaint is based on the contention that if it were not for that provision its position would have been improved, in line with the progress which the Directive at issue seeks to achieve in the liberalization of the rules concerning inter-regional air traffic.

57. In the light of the foregoing, the ground for complaint *relied on* by the applicant may be described as follows:

58. In its capacity as the owner of the terminal, the applicant essentially regards itself as adversely affected by the fact that it continues to be denied the advantages which would have accrued to the economic value of its property as a result of the increase in air traffic.

59. The position is very much the same as regards the alleged loss of revenue from fees and taxes. The applicant's complaint in that regard is that its local community is being denied the opportunity of increasing the revenue thus generated.

60. As regards its interest as an authority involved in the procedure for the approval of inter-regional air services, the applicant states that under the constitutional agreements reached by the United Kingdom and Gibraltar with the Civil Aviation Authority (CAA) it is able to say whether it supports the setting up of an air service to and from Gibraltar. It is thus necessarily involved in the grant of every approval by the Home State, within the meaning of Article 3(1) of Directive 83/416. The increase in the number of cases in which it can exert its influence is of importance to the applicant in that regard.

61. The applicant's submissions regarding responsibility for the well-being of the inhabitants of Gibraltar are ambiguous. It relies in part on an argument that that right concerns the extension of air links. That viewpoint does not differ in that regard from that relating to its involvement in the procedure for approving inter-regional air services. It relies in part upon its power, as a public-law body, to represent the interests of its inhabitants. The basis of its assertion of the economic interest of those inhabitants is thus that they should not be deprived of the benefits arising from improved communications and an increase in the volume of traffic.

62. To what extent does the applicant have a *real ground for complaint*?

63. As regards its position as the owner of the terminal, as the fiscal authority and as the representative of the economic interests of the inhabitants, it undeniably has a ground for complaint. Those *economic* interests may increase in value as a result of the growth in the volume of economic activity in general which the applicant expects to occur in the course of the increase in the volume of traffic, or as a result of the rise in certain, precisely defined revenue. As matters stand at the present stage of the deliberations, however, the possibility cannot be excluded that it would infringe the general principles of Community law if the applicant were to be denied that increase in value.

64. The position is different, however, as regards the applicant's interest as an authority involved in the procedure for the approval of inter-regional air services.

65. There can be no prejudice to the right of consultation granted in that regard -assuming it exists[44] - merely because the number of cases in which it applies is not increased. That right operates to protect the applicant's interest in influencing the CAA's decision in each individual case. It is not affected by a possible increase in the number of procedures for approval.

66. III. On that basis, it is first necessary to consider whether the contested measure is of *direct* concern to the applicant.

67. The meaning of this requirement is most readily apparent, in my view, from the case of *Piraiki-Patraiki*[45]. It was held in that case that the applicant's complaint must arise directly from the contested measure, that is to say, not from some later act of the Community or of the Member State concerned which is based upon a discretionary decision. In derogation from that principle, the existence of scope for the exercise of such discretion will not preclude the applicant from being directly affected, provided there is certainty regarding the way in which such discretion will be exercised and it consequently appears that a decision has already been made in the contested measure regarding the prejudice to the applicant.

68. In applying that criterion to the present case, it is significant that the provisions of Directive 89/463 regarding airports which are not excluded from its sphere of application impose an obligation on Member States. They are obliged, in relation to regional services to those airports, to incorporate into their domestic

44 -- According to the wording of the provisions produced by the applicant and the United Kingdom a right of consultation vests only in the Secretary of State (see Regulation 16 of the CAA Regulations 1983 and Regulation 21 of the CAA Regulations 1991). According to the letters produced by the applicant (Annexes B and C to the reply to the questions put by the Court), however, the established convention appears to be to consult the applicant as well.

45 -- Judgment in Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207.

law and to apply those liberalization measures which arise from that directive. The provision contested in this case contains one exception to that obligation - applying until such time as the Joint Declaration of 2 December 1987 comes into operation: the Member States are not obliged to take the specified measures in relation to Gibraltar airport. On the other hand, there is no formal prohibition on doing so. Nor are the Member States prohibited from concluding with regard to Gibraltar airport (bilateral) agreements concerning air services which correspond to the directive at issue. The foregoing is apparent from Article 10(1) of Directive 83/416, to which the Commission rightly refers and which provides as follows:

'The Home State and a State affected may by agreement apply less restrictive provisions whilst respecting the present Directive.'

69. It follows from those considerations that in several respects the discretion vested in the Member States may preclude the applicant from being directly affected.

70. One such instance concerns the discretion vested in Member States to apply Directive 89/463 - at least in substance - to Gibraltar airport, notwithstanding the provision contested in this case. The Commission relies on that factor in maintaining that the applicant is not directly concerned.

71. However, that view must be rejected. The possibility referred to exists only in theory. It must be stated generally that the insertion of the contested provision at the instigation of Spain and the United Kingdom[46] was accepted in the Council as a compromise to take account of the dispute as to sovereignty over the land on which the airport is situated. Furthermore, the provision has been inserted in a context in which the Member States' powers in the sphere of aviation are curtailed by the Community rules. There is thus no reason to expect that Member States will apply the system laid down by Directive 89/463 to Gibraltar airport. This applies in particular to Spain and the United Kingdom. No submission has been made, moreover, to the effect that the Member States will proceed in that way. Nor can the British aviation authority, in its capacity as the competent authority of the 'State affected' in cases involving applications from other States within the meaning of Article 3(3) of Directive 83/416, be expected systematically to authorize air services on a bilateral basis in accordance with the criteria laid down in Directive 89/463[47]. The fact that the United Kingdom would thereby be at risk of infringing the spirit, if not the letter, of the agreements with Spain means that there is even less justification for any such expectation.

46 – See Annex 8 at the end of the Spanish Government's pleading.

47 – The same applies to the Spanish aviation authority so far as concerns its competence. The division of competence between the Spanish and United Kingdom aviation authorities as regards flights to and from Gibraltar appears to be the subject-matter of paragraph 1 of the Joint Declaration.

72. I now turn to the question of the discretion granted to Member States by the actual wording of Directive 83/416, as amended by Directive 89/463. As far as the 'State affected' is concerned, it no longer has any appreciable discretion in relation to applications from the Home State, since Article 6(1)(c) of Directive 83/416 in its original version is deleted from the version as amended by Directive 89/463.

73. On the other hand, the directive does not limit the Home State's discretion to grant to the air carrier concerned an authorization which alone can give rise to an obligation for the State affected to give its approval[48].

74. It may be said in that regard, as the Spanish Government points out, that a discretion vested in a third party is interposed between the advantage sought by the applicant and the directive.

75. In my view this does not mean, however, that the applicant is not directly concerned. The basis of the applicant's complaint is that it is being deprived of the undeniably real chance of an increase in air traffic. The aforementioned discretion vested in Member States in their capacity as Home States is without doubt one of the factors, together with the commercial practices followed by air carriers, which leads to the advantage thus denied to the applicant being no more than a chance. It therefore qualifies the nature of the complaint, but not the fact of its personally affecting the applicant. That effect is directly attributable to the contested provision, and is not dependent on other measures which the applicant could contest. It would indeed be incomprehensible if legal protection against a measure were to be refused merely because of the lack of a precise definition of the advantage claimed by the applicant, the grant of which was denied by that measure. The fact that the advantage was incapable of being specified in concrete terms was precisely the result of the contested refusal. This view is supported by the judgment in the *Cofaz* case. In that case the applicants, who were competing with State-aided undertakings, contested the termination by the Commission of the procedure under Article 93(2) of the EEC Treaty. The Court held in that regard:

'As regards the question whether the Commission's decision to terminate the procedure is of direct concern to the applicants, it is sufficient to observe that the decision has left intact all the effects of the tariff system set up, whilst the procedure sought by the applicants would lead to the adoption of a decision to *abolish or amend* that system. In those circumstances, it must be held that the contested decision is of direct concern to the applicants'[49].

48 -- See the third recital in the preamble to Directive 83/416.

49 -- Judgment in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, paragraph 30; emphasis added.

76. Thus, the fact that the consequences of the implementation of the procedure were not certain did not prevent the Court from finding that the applicants were directly concerned. The parallels with the present case are obvious.

77. The Council and the Commission further submit that the nature of the interests asserted precludes the view that the applicant is directly concerned. They rely in that regard on the hypothetical and indirect nature of the financial advantages expected to follow from the application of Directive 89/463. Furthermore, the alleged right to promote the well-being of the inhabitants of Gibraltar cannot be taken into account, since it constitutes merely a bundle of legal positions which could indirectly be adversely affected in the future (according to the Commission) or because it represents an undefined, political position (according to the Council).

78. That argument cannot be accepted. The requirement that the contested measure be of direct concern to the applicant does not mean that specific types of interests are excluded from the legal protection afforded by the second paragraph of Article 173. It is in fact designed to exclude actions brought against measures which leave the determination of the principle and scope of the interference with the interests relied on - of whatever kind - to *subsequent discretionary decisions, which could then form the subject-matter of an action*[30]. As regards the interests asserted by the applicant, however, those negative conditions are not met. Nor is the allegedly 'indirect' nature of those interests decisive. In so far as the applicant is thereby alleged to be in reality basing its application on the interests of others (namely those of the inhabitants of Gibraltar), that can only mean that it would then not be *individually* concerned[31]. To the extent that the aforementioned submissions presuppose that the disadvantages suffered by the applicant stem from a lacuna in the liberalization of the rules *applying to air carriers*, they are likewise untenable. Any ground of complaint those carriers may have is of a completely different kind and does not occur as a general rule until a concrete application for approval of an inter-regional scheduled service to and from Gibraltar is refused. Such refusal may be contested by the *air carrier*. However, the only judicial means by which the *applicant* can avert the specific ground of complaint asserted in the present case is by bringing this action[32].

79. The Spanish Government further contended that the effect of the contested provision will come to an end as soon as the Joint Declaration comes into operation. Suffice it to say in that regard that the latter circumstance will cause the

30 – See in this regard the Opinion of Mr Advocate General Warner in Joined Cases 103/78 to 109/78 *Société des Usines de Beauport* v *Council* [1979] ECR 17, at p. 31.

31 – See paragraph 41 above.

32 – In the discussions on this point at the hearing, none of the parties was able to point to a specific domestic legal remedy.

provision not to *come into effect* but to *cease* to be effective. The direct nature of the effect of the contested provision upon the applicant is thus in no way altered[53].

80. All in all it must be held that that provision is of direct concern to the applicant.

81. IV. It is then necessary to examine the objection of inadmissibility based on the 'nature of the act appealed against'. That objection comprises two parts: first, the characteristic of the contested provision as *part of a directive*; and secondly, the fact that it *is not in the nature of a decision*.

82. Whilst the first part of that objection concerns the *form* of the legal act, the second relates to its *substantive nature*.

83. 1) Consideration should first be given to the significance of the fact that the contested provision forms part of a directive.

84. On its wording, clearly, the second paragraph of Article 173 excludes proceedings brought by individuals against directives. Is this enough, however, for the present action to be dismissed as inadmissible?

85. The Court has not yet expressed its views on that question. Previous direct actions[54] brought by individuals against the provisions of directives have been held inadmissible on other grounds, either that the limitation period had expired[55], or that the measure complained of did not constitute a decision[56] or that it was not of individual concern to the applicant[57].

86. The question whether the present action should be dismissed as inadmissible by virtue of the terms of the second paragraph of Article 173 depends in my view

53 -- The Court has previously rejected, in its judgment in Joined Cases 106 and 107/63 *Töpfer* v *Commission* [1965] ECR 405, an argument comparable to that advanced by the Spanish Government: see, on the one hand, the views expressed by the Court (p. 411 et seq.) and, on the other hand, those of Mr Advocate General Roemer (p. 417 et seq.).

54 -- See, in addition to the orders referred to in the following three footnotes, the Order in Case 65/87 R *Pfizer* v *Commission* [1987] ECR 1691. In making that Order, the President of the Court, in giving his decision on an application for interim measures, expressly left open the question of the admissibility of the main application (paragraph 15 of the Order).

55 -- Order of the Court in Case 352/87 *Farzoo and Kortmann* v *Commission* [1988] ECR 2281.

56 -- Order of the President of the Court of 13 July 1988 in Case 160/88 R *Fédération européenne de la santé animale and Others* v *Council* [1988] ECR 4121.

57 -- Orders of the Court in Case 138/88 *Flourez and Others* v *Council* [1988] ECR 6393 and Case 160/88 *Fédération européenne de la santé animale* v *Council* [1988] ECR 6399.

upon the rationale for the framers of that provision not to specify directives as acts capable of being challenged. Were it to become apparent that that ground does not in the present instance justify a declaration that the action is inadmissible, then the wording of the provision should also not be regarded as a bar to the admissibility of the action. In that case the point in question, in so far as the contested provision is incorporated in the context of a directive, would be a mere characteristic of its *form*. As the Court has consistently held, however, the Community legislature may not exclude the legal protection envisaged by the second paragraph of Article 173 solely by the choice of the form of an act[58]. To deny an applicant legal protection merely because the contested provision forms part of a directive, and thereby to ignore the fact that the substantive reason for the omission of any reference to directives in the second paragraph of Article 173 may perhaps not apply in an individual case, would moreover be inconsistent with the duty of the Court as defined in Article 164 of the Treaty[59].

87. Consideration needs therefore to be given, first of all, to the reason why the framers of the Treaty did not include, in the second paragraph of Article 173, directives as acts capable of being challenged. To that end, that provision must be considered in the light of Article 189 of the Treaty, in the third paragraph of which directives as legal acts are described in the following manner:

'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

88. According to that description, the provisions of a directive allow for a discretion relating specifically to its *transposition* by its addressees - the Member States. Therein lies, in accordance with the scheme of Article 189, the difference between directives and decisions addressed to the Member States. That appears to me to be the only explanation why decisions addressed to Member States fall within the ambit of acts capable of being challenged within the meaning of the second paragraph of Article 173 but directives do not. As regards the provisions of directives, the framers of the Treaty appear to have assumed that such provisions, because of the specific discretion allowed to Member States in relation to their transposition, *are not of direct concern* to individuals, even where they serve to impose a burden on economic operators.

89. However, that premise proves to be incorrect where there exists no such discretion as regards transposition.

58 – Consistent case-law in instances where the contested provision was contained in a regulation: see, for example, the judgment in Case 101/76 *Koninklijke Scholten Honig* v *Council and Commission* [1977] ECR 797, paragraph 6.

59 – See the judgment in Case C-70/88 *Parliament* v *Council* ('Chernobyl') [1990] ECR I-2041, paragraph 26.

90. That is the position, for example, where the provision of the directive concerned lays down a prohibition which, as regards its content and the group of persons potentially affected by it, is so precise that it is incapable of being rendered more specific by the Member States. The implementing measures taken by the Member States would, as regards the principle underlying them and their essential details, constitute merely the necessary consequence of the Community provision.

91. The Court was concerned with such a situation in Case 160/88[60]. In that case, manufacturers of hormonal preparations used in the rearing of animals (and an association of such manufacturers) had applied pursuant to the second paragraph of Article 173 for a declaration that provisions in a directive prohibiting the use of some of the preparations manufactured by them were void. That application was held to be inadmissible, since the contested provisions were of a normative nature and thus could not be regarded as a 'decision' (according to the order of the President of the Court in the proceedings for interim measures) or because the prohibitions at issue were not of individual concern to the applicants (according to the Court in the proceedings on the main application).

92. The Court thus avoided declaring the action inadmissible solely on the ground that the contested provisions were contained in a directive. It is moreover clear from the order made by the President in the proceedings for interim measures that the causal relationship between the contested measure and the applicant's ground of complaint was of a direct nature. No other function was attributed to the Member States' implementing measures than to transpose the clear contents of the provisions of the directive to the economic operators concerned. According to paragraph 28 of the order, the provisions of the directive apply

'by way of national legislation adopted by the Member States in order to comply with the directive, ... to objectively determined situations and produce legal effects with regard to categories of persons envisaged in a general and abstract manner ...'.

93. As far as the present case is concerned, it cannot be treated any differently, as regards the point in question, from the aforementioned Hormone case. That case concerned a prohibition falling within the scope of application of the directive which was sufficiently precise to exclude any discretion regarding its transposition by the Member States. In the present case, Gibraltar airport is excluded from the outset from the scope of application of the directive. Logically, therefore, there can be no discretion as to the transposition of that directive in relation to that airport. As is apparent from my earlier comments[61], the discretion vested in the Member States in relation to air services to and from that airport is that retained

60 -- See footnotes 56 and 57.

61 -- See paragraphs 68, 69 and 70 above.

by them generally in respect of air traffic in the absence of any Community provisions, and not the specific discretion allowed to them for the purposes of the transposition of the directive.

94. Those considerations suffice in themselves to enable the contested provision to be treated as if it were contained in a decision addressed to the Member States[42].

95. For the sake of completeness, however, it should be pointed out that even the discretion vested in the Member States independently of the directive has only a theoretical influence on the rules applying to Gibraltar airport[43].

96. In view of all the foregoing, the fact that the contested provision is contained in a directive does not in itself render the application inadmissible.

97. 2. The second part of the present objection of inadmissibility is based, as stated above, on the fact that the contested provision is not *in the nature of a decision* but is rather a rule of general application. As I explained at length in my Opinion in the case of *Codorniu*[44], that fact in itself is also not enough for an application to be declared inadmissible pursuant to the second paragraph of Article 173. The requirement that there be a 'decision' is in fact subsumed in the broader requirement of the aforementioned provision that the contested measure must be

42 – That does not necessarily signify that the contested provision can be challenged under the second paragraph of Article 173 as a "a decision addressed to another person". According to the logical approach applied in Case 160/88 R, a directive, even though it is addressed to the Member States, can produce normative effects through the domestic implementing measures. That admittedly somewhat problematical logical approach must also extend to the provisions of a decision which is addressed to the Member States. Under my approach, it is unnecessary to consider this matter further since, as will be pointed out below (in paragraph 97), the requirement regarding a decision under the second paragraph of Article 173 is subsumed in the broader requirement that the contested measure be of individual concern to the applicant. At the same time, the application of that principle ensures that the question whether provisions of secondary legislation can be challenged is always determined on the basis of the same objective criteria, irrespective of where those provisions occur (in a regulation, a directive or a decision).

43 – See paragraph 71 above.

44 – Opinion of 27 October 1992 in Case C-309/89 *Codorniu* v *Council*, not yet published in the ECR, paragraphs 22 to 37.

of individual concern to the applicant[65]. I will set out my views on that requirement in the following section.

98. V.1. In answering the question whether the contested provision is *of individual concern* to the applicant, reference must be made first to the general meaning of that characteristic. As is well known, a measure is of individual concern to persons only if the decision 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'[66].

99. That characteristic is thus intended to ensure that the position of an applicant in relation to the contested measure is comparable to that of an addressee. For that purpose it is not enough that the applicant is a member of a self-contained category of persons concerned[67]. What is required is a specific link between the situation (in the broadest sense of the word) of the applicant and the contested measure, and that specific link can be established by various circumstances[68].

100. However, in applying to the present case the principles developed in that regard in the case-law of the Court, two particularities of this case must be borne in mind. The first is that the applicant, as previously indicated[69], is not complaining of interference with an existing position, but is criticizing the Council for the fact that the contested provision continues to deprive it of certain advantages. The second particularity relates to the interests asserted by the applicant, which are connected with the applicant's various functions. The applicant relies primarily on its capacity as the owner of the terminal, but asserts in addition (other) 'pecuniary' interests connected with its capacity as Gibraltar's fiscal authority[70]. As regards the applicant's position as an authority taking part in the procedure for the approval of inter-regional air services, on the other hand, there is not even any ground of complaint, with the result that that interest does not need to be

65 -- In my opinion the more recent judgment of 24 November 1992 in Joined Cases C-15/91 and C-108/91 *Buckl* v *Commission* [1992] ECR I-0000 is consistent with that view. It is true that in that case the Court concentrated first and foremost on the nature of the measure requested by the applicant as a 'rule of general application' (paragraphs 24 to 26). However, upon closer examination the subsequent grounds (paragraphs 27 to 30) can be seen to relate to the question whether the applicants were individually concerned by the contested refusal to adopt that measure.

66 -- Judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107.

67 -- See the judgment in Case 123/77 *UNICME* v *Council* [1978] ECR 845, paragraph 16.

68 -- See in particular my Opinion in the case of *Codorniu*, cited above, paragraph 39 et seq.

69 -- Paragraphs 55 and 56 above.

70 -- See, for further details, paragraph 122 below.

examined further in this connection[71]. In so far as the applicant relies, on the basis of that position, upon its competence to look after the well-being of the inhabitants of Gibraltar, that also does not require further examination[72]. On the other hand, regard must be had, in the examination carried out below, to its alleged authority to represent the interests of its inhabitants.

101. 2.(a) Let us first consider the interests which the applicant founds on its capacity as the owner of the terminal. For the sake of completeness, it should be stated in that regard that those interests are connected with the procurement of revenue from the leasing of the facilities of that terminal; at the time when the proceedings were brought, the lessor was Gibraltar Airport Services Limited (GASL), in which the applicant held a 50% interest. This is one of the positions with regard to which the applicant's complaint is based on the fact that it has been deprived of the opportunity of increasing its revenue[73].

102. Applying the principles set out above, the applicant cannot be regarded as individually concerned merely because Gibraltar airport has only one terminal, of which it is the owner: membership of a self-contained group of affected persons is just one of the conditions which an applicant must fulfil in order to be regarded as individually concerned. The question is rather whether there exists, in relation to the applicant's aforementioned interest in increasing revenue, any particular relationship between its situation and the contested measure, such that the applicant's position is analogous to that of an addressee of that measure.

103. In my view the answer to that question must be in the negative.

104. The circumstances which may give rise to such a special relationship include, first and foremost, the causal connexion between the situation of an applicant and that of the contested measure[74]. The judgments in *Töpfer*[75] and *Bock*[76], upon which the applicant relies in the present context, fall into that category. The *Töpfer* case concerned the retroactive authorization of a Member State to take protective measures warranting the refusal of import licences which had already been applied for by the applicants. There thus existed a causal link between the contested measure and the applicants' situation as operators which had applied for the licences. The same applied in the case of *Bock*, in which the Member State

71 – See paragraphs 64 and 65 above.

72 – See paragraphs 61, 64 and 65 above.

73 – See paragraphs 58 and 59 above.

74 – See, for example, the judgment in Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207, paragraphs 28 to 31; see also my Opinion in the case of *Codorniu*, cited above in footnote 64, paragraph 40.

75 – Judgment in Joined Cases 106/63 and 107/63 *Töpfer* v *Commission* [1965] ECR 547.

76 – Judgment in Case 62/70 *Bock* v *Commission* [1971] ECR 897.

concerned was permitted to exclude from Community treatment certain goods originating from the People's Republic of China and in free circulation in the Benelux countries. That decision was made with specific regard to an application by the applicant for an import licence[77]. However, in this case the precondition of a causal connection as thus defined is not met. The contested measure has nothing to do with the particular situation of the economic operators concerned in the commercial exploitation of terminals. It is immaterial in this respect whether reference is made to the aims of the directive as a whole or to the specific objective underlying the contested provision itself.

105. It must be stated in that regard that Directive 83/416 pursues two economic aims. The first of these is apparent from the first recital in the preamble to that directive, which states:

'a Community procedure for authorizing scheduled inter-regional air services between Member States, for the transport of passengers only or in combination with mail and/or cargo between certain Community airports, will give air carriers greater scope to develop markets and could thus contribute to the evolution of the intra-Community network'.

106. Similarly, the fourth recital in the preamble to Directive 89/463 states:

'experience has shown that only a few services have been authorized in accordance with the Directive and that it would therefore be desirable to give air carriers greater scope to develop markets and thereby contribute to the evolution of the intra-Community network'.

107. It was thus primarily the position of the air carriers that was decisive in the formulation of the original legal act and of the amending directive in question here. However, the applicant does not even belong to that category of economic operator (a category which is moreover open), whose situation was a determining factor for the legislature.

108. Similar considerations apply as regards the regional-policy aims of Directive 83/416. The fourth recital in the preamble thereto states:

'it is necessary to develop internal Community air traffic on regional routes in order to contribute to the development of the regions within the European Community'.

109. There is likewise nothing in those aims to demonstrate that the position of owners of civil terminals was of significance as regards the rules laid down by the

77 -- See section I(2) of the Issues of Fact.

directive. Those aims are of concern to all economic operators in disadvantaged regions which might benefit from improved connections to their regions.

110. Finally, as far the contested provision itself is concerned, it is based, as is apparent from the eighth recital in the preamble to Directive 89/463, on the factors forming the subject-matter of the Joint Declaration of 2 December 1987. That declaration is itself the consequence of the difference of opinion between Spain and the United Kingdom regarding the land on which the airport is situated and the difficulties which ensue in the Council's view in relation to the application of the directive to Gibraltar airport; the declaration is not based, however, upon the applicant's situation as the owner of the terminal.

111. Nor is that conclusion in any way affected by the fact that the Joint Declaration envisages the construction of another terminal by the Spanish authorities. As is apparent from the Joint Declaration, the purpose of that measure is to enable the Spanish authorities to carry out directly customs and immigration controls in respect of passengers travelling to and from places lying to the north of the border fence. It thus falls within the framework of the difference of opinion regarding international law between the two Member States concerned and has no substantive connection with the economic interests of the applicant as the owner of the existing terminal.

112. For all those reasons, it cannot be said that the position of the applicant - whether on its own or as a member of a closed category of persons - was decisive for the contested provision. There can thus be no justification from that point of view for regarding the applicant as individually concerned.

113. However, the situation of an applicant as a person individually concerned may result from other factors creating a special relationship between that applicant and the contested measure. One such decisive factor would be if an applicant was protected by particular terms in the legal basis for the contested measure. That concept is a very familiar one in the Community competition rules[78], but has also been applied in cases relating to the common agricultural policy[79]. It is of particular significance in situations in which, as in the present case, the applicant, by means of his action for annulment, is seeking to *better* his position and not to avert the worsening of a position (protected by fundamental rights). A protective provision in the context of the legal basis may legitimate that interest and thus create a special relationship between the applicant's situation and the contested measure.

78 – See my Opinion in Case C-313/90 *CIRFS* v *Commission* [1993] ECR I-0000, not yet published in the ECR, paragraphs 83 to 86 and 88 to 90.

79 – See the judgment in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, and the *Buckl* judgment (footnote 65 above).

114. However, that precondition is not fulfilled in the present case either. According to the first citation in the preamble thereto, the directive at issue is based directly upon Article 84(2) of the Treaty. That provision empowers the Council to enact 'appropriate provisions for sea and air transport'. It does not provide for any particular protection for individual groups of economic operators.

115. Lastly, the applicant cannot be regarded as individually concerned on the basis of the principles laid down in the *Extramet*[80] judgment either. That judgment related to a case in which an anti-dumping duty was levied on products imported and processed by the applicant. The Court held in that regard (at paragraph 17):

'The applicant has established the existence of a set of factors constituting such a situation which is peculiar to the applicant and which differentiates it, as regards the measure in question, from all other traders. The applicant is the largest importer of the product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product. In addition, its business activities depend to a very large extent on those imports and are seriously affected by the contested regulation in view of the limited number of manufacturers of the product concerned and of the difficulties which it encounters in obtaining supplies from the sole Community producer, which, moreover, is its main competitor for the processed product.'

116. That case involved, therefore, a situation in which the applicant wished to avert interference with its existing position, rather than an application aimed at improving that position, as in the present case[81]. In my view, the principles laid down in *Extramet* are applicable in a case such as this only if the applicant can substantiate his contention that he has a *legally protected interest* in the improvement of his position. If, despite that protection, he has been denied that benefit, that may, depending on the circumstances, be equated with an interference with an existing position and justify the application of the 'impact' criterion set out in the *Extramet* judgment[82].

117. Such protection may arise by reason of the fact that an applicant belongs to a precisely defined group of economic operators which are intended to benefit

80 -- Judgment in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501.

81 -- The *Codorniu* case was also concerned with interference with an existing position since the applicant in that case was being deprived of the possibility, of which it had hitherto availed itself, of using the designation Crémant for its sparkling wines. As in the *Extramet* case, that interference directly affected the applicant's competitive position (see paragraphs 49, 50 and 51 of my Opinion in *Codorniu* (cited in footnote 64).

82 -- In my view, this is also supported by the *Buckl* judgment (footnote 65 above), in which it was held that the applicant had no legally protected interest in the protective measures sought. As a logical consequence, the application of the principles laid down in *Extramet* to that case was not discussed.

from Community treatment (in the case of Community aid, for example). In those circumstances, the legal protection afforded to the interest relied on stems from the principle of equal treatment. In order for the principles laid down in *Extramet* to apply, it is not necessary in that context for the group of economic operators concerned to be finite, since the individualization of the applicant within that group will, if appropriate, emerge from the principles laid down in that judgment itself.

118. In the present case, it is at most the air carriers that might be regarded as such a group of economic operators[33], but they do not include the applicant.

119. Nor does the legal basis applied afford any specific protection for the interests asserted by the applicant in its capacity as the owner of the terminal[34].

120. The applicant has not pointed to anything else from which it might derive legal protection for its interests.

121. Consequently, it cannot be regarded as individually concerned in so far as it seeks to rely on its position as owner of the terminal.

122. (b) The applicant further relies on its capacity as an agency levying various fees and taxes (taxes on aircraft fuel, customs duty on freight coming into Gibraltar, tax on sales in the duty-free shop, airport departure taxes charged to passengers, storage charges on freight stored in the airport, and revenue from taxes levied on all economic operators carrying on business at the airport, which fall in that regard within the jurisdiction of the applicant).

123. Essentially the same considerations apply in that regard as to the question whether the applicant is individually concerned in its capacity as the owner of the terminal. The further point should be made that the applicant cannot, as regards taxes levied in connection with the economic activities of third parties, the increased volume of which will generate greater tax revenue, be placed in a better position than the economic operators carrying on those activities. That consideration applies to the taxes on aircraft fuel, on sales in the duty-free shop, and on storage charges and to the taxes levied on economic operators carrying on business in the airport. In that regard, no distinction can be drawn between the applicant's position as a fiscal authority and as the owner of the terminal.

124. According to the particulars given by the applicant, the departure taxes appear to constitute a payment made by passengers in return for the use of the airport facilities being expanded and devleoped by GASL, the revenue from which is shared between GASL and the applicant. In that regard, similarly, the applicant

33 – See paragraphs 105 to 107 above.

34 – See paragraph 114 above.

cannot be treated differently from any economic operator carrying on business in the airport.

125. It is true that the customs duty charged on freight brought into Gibraltar appears to be linked not directly to any economic activity carried on by third parties but to the physical entry of goods onto Gibraltar territory. However, the applicant's position in that regard cannot be compared to that of an addressee of the measure either. Comparison would be possible with other economic operators having an interest in an increase in imports of goods into Gibraltar, such as transport companies.

126. All those conclusions are ultimately in accordance with the submissions of the applicant, which describes its interest as the fiscal authority, like the interest which it has as the owner of the terminal, as a 'pecuniary' interest.

127. (c) It remains to consider the interest of the applicant in looking after the well-being of the inhabitants of Gibraltar. In the present context, all that remains to be determined in that regard is whether the applicant is individually concerned in so far as it is relying on the economic interests of the inhabitants. It should further be stated in that connection that the applicant, according to my understanding of its submissions, is not pleading any interference with its competence in the sphere of economic life in Gibraltar. It is moreover impossible to see what such interference might consist of. Furthermore, the applicant has not advanced any argument to the effect that the substance of such competence in practice would be in any way diminished as a result of the economic life of Gibraltar being brought to a standstill because air traffic would not be expanded to the extent previously anticipated.

128. In support of its view that it is empowered to represent the interests of the inhabitants of Gibraltar, the applicant relies upon the Court's decision in the case of *Chris International Foods*[35].

129. That case concerned an application for annulment and damages by an economic operator in relation to a decision by the Commission authorizing a Member State, pursuant to Article 115 of the EEC Treaty, not to apply Community treatment to bananas originating in certain dollar-area countries which were in free circulation in other Member States. Dominica, as one of the countries whose production appeared to be favoured by that measure, had applied to intervene in the action pursuant to Article 37 of the Statute of the Court of Justice of the EEC. At the end of its order the Court held, in that regard:

35 — Order in Joined Cases 91/82 and 200/82 *Chris International Foods* v *Commission* [1983] ECR 417.

'The Court is of the opinion that Dominica is a person which has established a sufficient interest in the result of the case, within the meaning of the second paragraph of Article 37 of the Statute of the Court, and that it must therefore be allowed to intervene.'

130. In my view, it does not follow from that that the applicant in the present instance can be regarded as individually concerned. That order of the Court in fact demonstrates only two things:

- the interest of the banana producers of Dominica could be relied on for the purpose of intervention in the action by that State;

- that interest did constitute an interest within the meaning of the second paragraph of Article 37 of the Statute.

131. As regards the first aspect, there might indeed be grounds for considering regarding non-member countries and other communities, by virtue of their duty to promote the well-being of their inhabitants, as being entitled, in individual cases, to assert not just their own interests but also those of economic operators carrying on business within their territory - *inter alia* for the purposes of the second paragraph of Article 173. From that standpoint, such an applicant would then be treated as though the interests asserted were based on its own rights. However, even if such a possibility were recognized, an applicant would in that context have a right of action only to the extent that the economic operators upon whose interests it relies themselves have a right of action.

132. Consequently, such an applicant, in so far as it does not assert specific interests of its own, must establish that the economic operators in question, or at least some of them, are themselves individually concerned[36].

133. That brings us to the second of the two aspects arising from the order in *Chris International Foods*. It should be noted that an intervener has only to establish an interest in the outcome of the case. As is evidenced by the very liberal practice of the Court, with which the aforementioned order is wholly consistent, the requirements which apply in this context are far less onerous than those applying to establishing that a person is individually concerned[37], perhaps precisely because the preconditions set out in the second paragraph of Article 173 for a direct action to be brought by an individual are very narrowly worded.

36 – Judgment in Case 282/85 *DEFI* v *Commission* [1986] ECR 2469, paragraph 16.

37 – See the survey by K. Wolf in: Von der Groeben, Thiesing, Ehlermann, *Kommentar zum EWG-Vertrag*, 4th Edition 1991, on Article 37 of the Statute of the Court of Justice of the EEC.

134. Consequently, it does not follow from the order cited by the applicant that it has a right of action in the present case. In order for it to have such right, it would have to show that the economic operators which it represents, or at least some of them, are individually concerned. However, there is nothing to indicate that this is the case.

135. VI. It follows, therefore, that this application does not fulfil the requirements of the second paragraph of Article 173, since the contested provision is not of individual concern to the applicant. That outcome does not, in my view, amount to a denial of justice and there is no need to answer the question raised in the oral procedure regarding the possibility of bringing proceedings in the national courts. It is certainly undeniable that the applicant, particularly in its capacity as the owner of the terminal, has a strong interest in the extension of air links to Gibraltar. However, the effect of the measure is not such as to constitute an interference with its existing position; nor was it found that the improvement it seeks in its position enjoys any specific legal protection. It cannot therefore be maintained that there has been any interference with a *right* vested in the applicant and that the applicant has been denied *protection for that right*.

C Conclusion

136. On those grounds, I propose that:

- the application should be dismissed as inadmissible;

- the applicant should be ordered, under Article 69(2) of the Rules of Procedure, to pay the costs, apart from those of the interveners, which should be borne by them pursuant to Article 69(4).

Annex IV

TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS

DE EUROPEESE GEMEENSCHAPPEN DOMSTOL

GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN

ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

CVRIA

LUXEMBOURG

COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES

CÚIRT BHREITHIÚNAIS NA GCOMHPHOBAL EORPACH

CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE

HOF VAN JUSTITIE VAN DE EUROPESE GEMEENSCHAPPEN

TRIBUNAL DE JUSTIÇA DAS COMUNIDADES EUROPEIAS

JUDGMENT OF THE COURT
29 June 1993

(Action for annulment of a directive – Authorization of scheduled inter-regional air services)

In Case C-298/89,

Government of Gibraltar, represented by Ian S. Forrester QC, of the Scots Bar, and Richard O. Plender QC, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 Rue Zithe,

applicant,

Council of the European Communities, represented by Antonio Sacchetini, a Director in its Legal Service, and Jacques Delmoly, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

supported by

Kingdom of Spain, represented by Javier Conde de Saro, Director-General for Community Legal and Institutional Coordination, and by Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Department for Matters before the Court,

* Language of the case: English.

/...

of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Derrick Wyatt, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

Commission of the European Communities, represented by Thomas Van Rijn, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Nicola Annecchino, a member of its Legal Service, Wagner Centre, Kirchberg,

intervenors.

CONCERNING, at the present stage of the proceedings, the admissibility of an action brought under the second paragraph of Article 173 of the EEC Treaty for the annulment of Article 2(2) of Council Directive 89/463/EEC of 18 July 1989 amending Directive 83/416/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (Official Journal 1989 L 226, p. 14),

THE COURT,

composed of: O. Due, President, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, M. Díez de Velasco, P.J.G. Kapteyn and D.A.O. Edward, Judges,

Advocate General: C.O. Lenz,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 May 1992, at which the Council was represented by Antonio Secchetini and John Carbery, Legal Adviser, acting as Agents, and the Kingdom of Spain was represented by Alberto José Navarro Gonzalez, Director-General for Community Legal and Institutional Coordination, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1993,

gives the following

GOVERNMENT OF GIBRALTAR v COUNCIL

Judgment

1 By application lodged at the Court Registry on 28 September 1989, the Government of Gibraltar brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Article 4(2) of Council Directive 89/463/EEC of 18 July 1989 amending Directive 83/416/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (Official Journal 1989 L 226, p. 14).

2 The aim of Council Directive 83/416/EEC of 25 July 1983 (Official Journal 1983 L 237, p. 19) is to establish a Community programme for the authorization by the Member States of scheduled inter-regional air services between those States in order to promote the development of the intra-Community network. The directive relates in particular to the authorization procedure to be followed, the possible grounds for refusal and the arrangements for approving the tariffs charged.

3 That directive was first amended by Council Directive 86/216/EEC of 26 May 1986 (Official Journal 1986 L 152, p. 47), which temporarily exempts from its application, on the same terms as those relating to the Greek islands already exempted by Directive 83/416, the airports in the Atlantic islands comprising the autonomous region of the Azores and Oporto airport, owing to the insufficiency of air traffic in those islands and the continuing development of the infrastructure at Oporto airport.

4 It was again amended by Directive 89/463 of 18 July 1989, cited above, which, in the light of the experience gained, lays down new rules to give airlines greater scope to develop markets and to promote the development of direct services between the various regions in the Community rather than indirect services. Essentially, this last directive extends the application of the foregoing arrangements to flights operated with aircraft with more than 70 passenger seats and eliminates several of the grounds for refusal of authorization for scheduled inter-regional air services contained in the initial directive. Directive 89/463 also contains a provision whereby its application to Gibraltar airport is suspended until the cooperation arrangements agreed between the Governments of the Kingdom of Spain and the United Kingdom come into operation.

5 That provision, which is contained in Article 2(2) of the directive with which this action is concerned, is worded as follows:

'Application of the provisions of this Directive to Gibraltar airport shall be suspended until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of the Kingdom of Spain and the United Kingdom will so inform the Council on that date'.

6 The Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 provides in particular, in its paragraph 8, that the arrangements for the joint use of Gibraltar airport will come into operation when the British authorities have notified their Spanish counterparts that the legislation necessary to give effect to paragraph 3.3 (customs and immigration controls in the respective terminals) is in force, or on completion of the construction of the Spanish terminal, whichever is the later, but in any event not more than one year after the notification referred to above.

7 Pursuant to the first subparagraph of Article 91(1) of the Rules of Procedure of the Court of Justice, the Council has raised an objection of inadmissibility against the application and has requested the Court to decide on that objection without going into the substance of the case.

8 Pursuant to Article 93(1) and (2) of the Rules of Procedure, the Court has granted the Kingdom of Spain (order of 15 November 1989), the United Kingdom (order of 17 January 1990) and the Commission of the European Communities (order of 21 February 1990) leave to intervene in support of the form of order sought by the defendant.

9 In support of its objection of inadmissibility, the Council first challenges the capacity of the Government of Gibraltar to bring proceedings, asserting that under British law the power to bring an action such as this is vested in the Governor. It further contends that a directive cannot be the subject of proceedings for annulment brought by a natural or legal person under the second paragraph of Article 173 of the EEC Treaty. Lastly, the Council maintains that the contested provision is not of direct or individual concern to the Government of Gibraltar.

10 The Government of Gibraltar claims that the objection of inadmissibility should be rejected. It maintains, first, that its legal personality is recognized under British law and that it encompasses, *inter alia*, the capacity to bring these proceedings, since the action relates to a 'defined domestic matter' within the meaning of section 55 of Annex 1 to the Gibraltar Constitution Order of 23 May 1969 and the Despatch from the Foreign Secretary to the Governor of Gibraltar of the same date, which includes tourism and the airport's civil air terminal amongst the matters recognized as falling within the competence of the ministers of Gibraltar. The applicant goes on to assert that Article 2(2) of Directive 89/463 constitutes a decision distinct from that directive which, since it has a direct effect, is subject to review by the Court of Justice under the second paragraph of Article 173 of the EEC Treaty. Lastly, the Government of Gibraltar claims to be directly and individually concerned by virtue of the nature of its participation in the procedure for the authorization of air services, as the body responsible for improving the well-being of the population of Gibraltar and as the owner of the airport terminal.

11 The interveners have all endorsed and expanded the objection of inadmissibility raised by the Council. In particular, the United Kingdom maintains, with regard

/...

to the constitutional provisions specific to Gibraltar, that as regards the fulfilment of international obligations, even adopting the hypothesis most favourable to the applicant's case, it is only on the instructions of the Governor that legal proceedings may be initiated on behalf of the Government of Gibraltar. The Kingdom of Spain and the Commission, for their part, observe that the contested directive does not contain any individual decision against which proceedings may be brought under the second paragraph of Article 173 of the EEC Treaty.

12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties regarding the objection of inadmissibility, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

13 Article 173 of the EEC Treaty provides:

'The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. ...'.

14 Since the Government of Gibraltar is not - and does not claim to be - amongst the applicants provided for in the first paragraph of Article 173, the admissibility of its application must be determined solely in the light of the second paragraph of that article.

15 It should be noted, first, that the Court has held, since its judgment in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes v Council* [1962] ECR 471, that the term 'decision' used in the second paragraph of Article 173 of the Treaty has the technical meaning employed in Article 189, and that the criterion for distinguishing between a measure of a legislative nature and a decision within the meaning of that latter article must be sought in the general 'application' or otherwise of the measure in question.

16 It should also be noted that even though a directive is in principle binding only on the parties to whom it is addressed, namely the Member States, it is normally a form of indirect regulatory or legislative measure. Moreover, the Court has already had occasion to classify a directive as a measure of general application (see, for example, the judgment in Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11,

and the order in Case 160/88 R *Fédération européenne de la santé animale* v *Council* [1988] ECR 4121, paragraph 28).

17 Furthermore, the Court has consistently held that the general application, and thus the legislative nature, of a measure is not called in question by the fact that it is possible to determine more or less precisely the number or even the identity of the persons to whom it applies at any given time, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (judgments in Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409; Case 64/69 *Compagnie française commerciale et financière* v *Commission* [1970] ECR 221, paragraph 11; Case 242/81 *Roquette Frères* v *Council* [1982] ECR 3213, paragraph 7; Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraph 13; order in *Fédération européenne de la santé animale*, cited above, paragraph 29; judgment of 24 November 1992 in Joined Cases C-15/91 and C-108/91 *Buckl*, not yet published in the European Court Reports, paragraph 25).

18 Lastly, the Court has already recognized that, where an instrument contains limitations or derogations which are temporary (judgments in *Zuckerfabrik Watenstedt*, cited above, and *Compagnie française commerciale et financière*, cited above, paragraphs 12 to 15) or territorial in nature (judgment in Joined Cases 103/78 to 109/78 *Société des Usines de Beaupont* v *Council* [1979] ECR 17, paragraphs 15 to 19), they form an integral part of the provisions as a whole within which they are found and, in the absence of any misuse of powers, are of the same general nature as those provisions.

19 In the present case, there is no dispute as to Directive 89/463 being of general application, save as regards Article 2(2), and the directive does indeed concern all scheduled inter-regional air services in the Community and it modifies the system for the authorization of such services by the Member States.

20 The provision under challenge suspends the application of that new system to services to or from Gibraltar until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 come into operation. It thus affects equally all air carriers wishing to operate a direct inter-regional air service between another Community airport and Gibraltar airport and, more generally, all those using the latter airport. It therefore applies to objectively defined situations.

21 Furthermore, it should be noted that Gibraltar airport is not the only airport to have been temporarily excluded from the territorial scope of the directive. Other airports (those in the Greek islands and in the Atlantic islands comprising the autonomous region of the Azores, as well as Oporto airport) have already been temporarily exempted from its application, by virtue of Directive 83/416 of 25 July 1983 and Directive 86/216 of 26 May 1986, cited above, for technical or economic

reasons, such as the insufficiency of air traffic or the continuing development of the airport infrastructure.

22 Directive 89/463 justifies the suspension of its application to Gibraltar airport by reference to the agreement in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987. This constitutes a finding that there is an obstacle of an objective nature to implementation of the directive, having regard to its aims. In view of the differences between the Kingdom of Spain and the United Kingdom, discussed at length by the applicant itself, concerning sovereignty over the territory on which Gibraltar airport is situated and the operational problems resulting from those differences, the development of air services between that airport and the other airports within the Community is conditional on the implementation of the cooperation arrangements agreed between those two States.

23 In those circumstances, Article 2(2) of Directive 89/463 cannot be regarded as constituting a decision within the meaning of the second paragraph of Article 173, but on the contrary is of the same general nature as that directive.

24 It follows that the application is inadmissible and must therefore be dismissed, without there being any need to consider the other submissions made in support of the objection of inadmissibility.

Costs

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Government of Gibraltar has been unsuccessful, it must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Spain, the United Kingdom and the Commission, intervenors, are to bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the applicant to pay the costs;

(3) Orders the Kingdom of Spain, the United Kingdom and the Commission, interveners, to pay their own costs.

Due Kakouris Rodríguez Iglesias

Zuleeg Murray Mancini

Joliet Schockweiler Moitinho de Almeida

Grévisse Díez de Velasco Kapteyn Edward

Delivered in open court in Luxembourg on 29 June 1993.

J.-G. Giraud
Registrar

O. Due
President